# THE ARBITRATION ACT

**(ACT No. X of 1940)**

With Exhaustive Commentary and Case Laws

*BY*

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**Second Edition**

ALLAHABAD LAW AGENCY

LAW PUBLISHERS

**9, University Road, Allahabad-2.**

*Published by* :

Allahabad Law Agency,
9, University Road,
Allahabad-2.







*Printed at* :

Saraswati Publishing House
13, Hamilton Road, Allahabad—2.

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THE FIRST SCHEDULE

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# THE
# ARBITRATION ACT, 1940

**(ACT No. X of 1940)**

**An Act to consolidate and amend the law relating to Arbitration.**

Whereas it is expedient to consolidate and amend the law relating to arbitration ;

It is hereby enacted as follows :

**Comment**

**Background of the present Arbitration Act, 1940 (X of 1940).**—The law relating to Arbitration in British India was substantially contained in the two enactments, that is to say, in the Indian Arbitration Act, 1899 (IX of 1899) and the Second Schedule to the Code of Civil Procedure, 1908 (V of 1908). The operation of the Arbitration Act of 1899 was limited to the Presidency-towns and to such other areas as it might be extended by the appropriate Provincial Government. Its scope was confined to "arbitration by agreement without the intervention of a court".

The Second Schedule to the Code of Civil Procedure, 1908 dealt with arbitrations outside the operation and scope of the Arbitration Act, 1899. It related for the most part to arbitration in suits, though arbitration without intervention of a court was also briefly provided for. This Schedule also contained an alternative method whereby the parties to a dispute or any of them might file their arbitration agreement before a court which, after a certain procedure, referred the matter to an arbitrator.

The Indian Arbitration Act, 1899 was based on the English Arbitration Act, 1899 (52 & 53 Vict., c. 49). Many sections were taken verbatim from that Act. Before the passing of the Arbitration Act, 1899, a contract to refer matters to arbitration was governed by the Indian Contract Act, the Civil Procedure Code and the Specific Relief Act of 1877. So far as the provisions contained in the Indian Contract Act and the Specific Relief Act were concerned, no contract to refer present or future differences to arbitration

could be specifically enforced. But the party who refused to perform was debarred from bringing a suit on the same subject. The Arbitration Act was complete in itself and was not affected by the rules as to appeals as laid down in the Code of Civil Procedure with reference to the proceedings taken under the Second Schedule of the Code. (*Saya Pye* v. *U. Kundinya*, 76 I. C. 525 ; A. I. R. 1924 Rang. 47).

Before the enactment of the Civil Procedure Code (Act VIII of 1859), sections 312 to 327, which contained rules for arbitration between the parties in suit, several Regulations were passed in Bengal, Bombay and Madras which also made provisions for referring suits to arbitration. (*Vide* Bengal Regulations of 1772, 1780 and 1781, Bengal Regulation XVI of 1793, Bengal Regulation XV of 1795, Bengal Regulations VI of 1813 and XXXVII of 1814, Bombay Regulation VII of 1827, Madras Regulation V of 1816 and Madras Regulation VII of 1816). These Regulations remained in force until the enactment of the Civil Procedure Code (Act VIII of 1859). The Act was extended to the Presidency-towns in 1862. The Bombay Regulations were repealed by Act X of 1861. The Madras Regulation VII of 1816 was repealed by Act VII of 1870.

In ancient India, decisions by *panchayats* were accepted as binding long before the regular courts were established by the British Government. The head of a family, the chief of a community or selected inhabitants of a town or village might act as *panchayat*. In ancient India, there were three grades of arbitrators, namely,—

(1) *Puga* ;

(2) *Sreni* ; and

(3) *Kula*.

According to Mr. Colebrooke, these were different degrees of *panchayat*, which was not in the nature of a jury or of a rustic tribunal but merely a system of arbitration subordinate to regularly constituted tribunals or courts of justice. "In the words of Martin, *C. J.*, arbitration was indeed a striking feature of ordinary Indian life, and it prevailed in all ranks of life to a much greater extent than was the case of England. To refer matters to a *panch* was one of the natural ways of deciding many a dispute in India. It might be that in some cases the *panch* more resembled a judicial court because the *panch* might intervene on the complaint of one party and not necessarily on the agreement of both, *e.g.*, in a caste matter. But there were many cases where the decision was given by agreement between the parties." In ancient times, the decisions of the *panchayat* were subject to revision. The decisions of *kula* or kinsmen

were subject to revision by the *Sreni*, which again could be revised by *Puga*. From the decision of the *Puga*, an appeal was maintainable to *Pradvivaca* and finally to the Sovereign Prince.

With the advent of British rule in British India, the *panchayati* system was not abrogated and provision was made in the Bengal Regulation of 1772 that in all cases of disputed accounts, *etc.*, it should be recommended to the parties to submit the decision of their cause to arbitration, the award which shall become a decree of the court. Further facilities for arbitration were intended to be given by Regulations of 1780 and 1781. In the Regulation of 1781, a provision was made that no award of any arbitrator or arbitrators be set aside, except upon full proof, made by oath of two credible witnesses that the arbitrators had been guilty of gross corruption or partiality, in the cause in which they had made their award. This provision which was enacted to render arbitration more effectual, affected the constitution of the arbitration board. The original Hindu idea was that it was a lowest tribunal, as such an appeal lay against its decision. But the Regulation of 1781 imported the idea that it was a tribunal of the parties' own choice; as such in the absence of misconduct the parties are bound by its decision. So the only course left open to a dissatisfied party was to impeach an award on the ground of gross corruption or partiality. The result was that all respectable persons declined to serve as arbitrators and the *panchayati* system fell into disuse.

Regulation of 1787 empowered the courts to refer certain suits to arbitration but that Regulation made no provision for difference of opinion among the arbitrators. There were other defects in it.

In 1793, the Bengal Regulation of 1793 (Reg. XVI of 1793) was passed whereby powers were given to court to refer matters to arbitration with the consent of parties where the value of the suit did not exceed Rs. 200/- and the suits were for accounts, partnerships, debts, non-performance of contracts, etc. In the Regulation, procedure for conducting arbitration proceedings were also laid.

Regulation XV of 1795 extended the Bengal Regulation XVI of 1793 to Benares and the Regulation XXI of 1803 extended the same to the territory ceded by the Nawab Vazeer.

Madras Regulations IV of 1816 and V of 1816 gave certain powers to *Panchayats* to settle disputes by them. Similar provisions were made by Bombay Regulations IV and VII of 1827.

In 1859, the first Code of Civil Procedure (Act VII of 1859) was placed in the Statute Book and law relating to arbitration was

incorporated in Chapter VI of that Code (sections 312 to 327). That Code was not applicable either to the Supreme Court or to the Presidency Small Cause Courts or to non-Regulation Provinces. This Act was repealed and consolidated by Act X of 1877 which again, with all its amendments, was replaced by Act XIV of 1882. The present Code which is now in force is Act V of 1908. The provisions regarding Arbitration were incorporated in Schedule II of the present Code. The present Arbitration Act of 1940 has repealed section 89, clauses (a) to (f) of sub-section (1) of section 104 and the Second Schedule of Act V of 1908.

The Arbitration Act, 1940 amended and consolidated the law relating to Arbitration. The Civil Justice Committee in 1925 recommended several changes in the arbitration law. The Act of 1899 was based largely on the then English law, to which several substantial amendments were effected by an Amending Act of Parliament in 1934 (24 & 25 Geo. V, c. 14). In 1938 the Central Government placed an officer on special duty to examine the question and the Arbitration Bill was the outcome of this examination. The existing law, the amended English law and the recommendations of the Civil Justice Committee, were scrutinised together and the Bill sought to consolidate and standardize the law relating to arbitration throughout British India in its details. Extracts from the sources referred to these principles of law which were most suitable to British India. This Bill received the assent of the Governor-General on 11th March, 1940 and is called the Arbitration Act, 1940.

**Interpretation of Consolidating Act.**—The Arbitration Act, 1940 is an Act which was passed mainly to consolidate and amend the law relating to arbitration. The object of consolidation is to collect the statutory law bearing upon a particular subject and to bring it down to date, in order that it may form a useful Code applicable to the circumstances existing at the time when the Consolidating Act is passed. (*Administrator-General of Bengal* v. *Prem Lal*, 22 I. A. 107 ; 22 Cal. 788 : *Santawant* v. *Basdev Nand*, 125 I. C. 477 ; A. I. R. 1930 All. 225 (F. B) ). It is not required that in a consolidating enactment, the enactment, when traced to its source, must be construed in accordance with the state of things which existed at a prior time when it became law. (22 I. A. 107). The proper course is, in the first instance, to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any consideration derived from the previous state of law, and not start with the enquiry how the law stood previously, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view.

In construing an Act of Parliament which is a consolidating Act and docs not profess to amend or alter the provisions of the Act consolidated *prima facie* the same effect ought to be given to its provisions as was given to those of the Acts for which it was substituted. (*Mitchell* v. *Simpson*, 25 Q. B. D. 183 : 59 L. J. Q. B. 355 : 63 L. T. 405).

In construing a consolidating and amending Act as distinguished from a codifying Act, the court is entitled to have regard to the previous decisions. (*Budgett, In re* : *Cooper* v. *Adams*, (1894) 2 Ch. 557 ; 71 L. T. 72 : 42 W. R. 551).

When a clause in an Act which has received a judicial interpretation is re-enacted in the same terms, the Legislature is deemed to have adopted that interpretation. (*Campbell, Ex-parte*, 5 L. R. Ch. 703 ; 23 L. T. 289 ; 18 W. R. 1056 ; *Balmukund Dube, in the Goods of*, A. I. R. 1930 All. 82 ; 126 I. C. 357).

If there is any doubt as to the proper construction of sections in a new Act, it is undoubtedly legitimate to consider the previous law which it was consolidating and amending. (*Secretary of State* v. *Mark & Co.*, A. I. R. 1940 P. C. 105).

In *Mathuradas* v. *Magan Lal*, 36 Bom. L. R. 47 ; 150 I. C. 478 ; A. I. R. 1934 Bom. 79, Blackwell, J., said :

"The expression "amend the law" means no more than alter the law previously existing in so far as it would be affected by the amendment."

It may no doubt be presumed that a local Legislature when re-enacting a former statute intends to accept the interpretation placed upon that statute by local courts of competent jurisdiction with whose decision the Legislature must be taken to be familiar. But when it incorporates in a local Act the term of a foreign statute, it cannot be presumed that it intends to accept the interpretation placed upon those terms by the courts of the foreign country with which the local Legislature may or may not be familiar. *Nadarajan* v. *Chandrasekhar*, 54 C. W. N. 878 (P. C.).

**Distinction between codifying and consolidating Acts.**— The distinction between statutes which codify and those which consolidate the law has been well summarised in paragraphs 770 and 771 of Volume 31, Halsbury's Laws of England :

"770. In construing a codifying statute, the proper course is, in the first instance, to examine its language and to ask what its natural meaning is. It is an inversion of the proper order of consi-

deration to start with enquiry how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear interpretation in conformity with the view. After the language has been examined without presumption, resort may be had to the previous state of the law for construction of provisions of doubtful import, or of words which have acquired a technical meaning, The same words used in different codes may have different meanings, in each code according to the intentions of the statutes having regard to the mischiefs which they are designed to prevent.

"771. If a distinction is to be drawn between statutes which codify and those which consolidate the law, it is that in construing the latter there is a presumption that the law was not intended to be altered, but this presumption must yield to plain words to the contrary. Where a consolidating statute re-enacts sections that have come into existence at different previous dates, the statute must be construed on the same principles as one which enacts the provisions in question for the first time."

**Interpretation of statutes**.—*Fiscal enactments* must be construed in favour of the subject (*Radhey Lal Balmukand, In re*, A. I. R. 1931 All. 23). The English jndgments in income-tax cases can be utilised as aids in the interpretation of analogous provisions of law though not as binding authorities on those matters where the language of the English and Indian Acts differs (In the matter of *Amritsar Produce Exchange, Ltd.*, A. I. R. 1938 Lah. 44.) In fiscal statutes doubts should be construed in favour of subject (*Behari Lal Bhargava* v. C.I.T., U. P., A. I. R. 1941 All. 135). Double taxation is against the policy of the Tax Act and the same tax should not be assessed twice on the same person. [*Makund Sarup's Case*, A. I. R. 1928 All. 81 (F. B.)]. It is elementary that the primary duty of a court is to give effect to the intention of the legislature as expressed in the words used by it and no outside consideration can be called in aid to find that intention (*The New Piecegoods Bazar Co.* v. C. I. T. A. I. R. 1950 S. C. 165). In construing a Taxing Act, the court ought not to strain the language of the Act against the tax-payer (*C. I. T. Bombay* v. *Chunni Lal B. Mehta*, A. I. R. 1938 P. C. 232). All fiscal enactments should be interpreted strictly and the subject is not to be taxed unless the language of the statute clearly imposes the obligation. It was also held that exemption also must be strictly construed and limited to the exemption itself. (*Sharfaji Rao* v. *Commissioner of Sales Tax*, 1953 S. T. C. 6).

"The canons of construction of statutes do not permit the court to take the reasonableness or unreasonableness of the consequence of interpretation as a factor for deciding on the correct interpretation. Whether the result is reasonable or not is in

substance a question of expedience and it is not for the court to dabble in it. [*Per* Das Gupta, J. in *Ajit Kumar* v. *Surendra Nath*, A. I. R. 1953 Cal. 733 (F. B.)].

"The cardinal rule for the construction of a statute is generally said to be that it should be construed according to the intention of the legislature that enacts it. The intention of the Legislature is legitimately ascertained from what it has chosen to enact, either in express words or by reasonable and necessary implication." (*Gour Gopal Mukherjee* v. *Chief Secretary of West Bengal*, A. I. R. 1953 Cal. 81 ; 1953 Cr. L. J. 310). "The duty of the court is to interpret the words that the Legislature has used. These words may be ambiguous, but even if they are, the power and the duty of the court to travel outside them on a voyage of discovery are strictly limited." (*Per* Lord Simonds in *Major and St. Mellons Rural District Council.* v. *New Port Corporation* [(1951) 2 All. E. R. 839].

"The argument based upon the policy underlying a *section* or an *Act* must be accepted with caution. If the words used in the section are clear and unambiguous and they admit of only one meaning, it is the duty of the Court in interpreting the said section to give the words their plain grammatical meaning." (*Himatsing Dhansing* v. *Some Devsing*, 56 Bom. L. R. 69).

Their Lordships of the Supreme Court said in *Poppatlal Shah's case* (1953) 4 S. T. C. 188 ; A. I. R. 1953 S. C. 274 :

"It is a settled rule of construction that to ascertain the legislative intent, all the constituent parts of a statute are to be taken together and each word, phrase or sentence is to be considered in the light of the general purpose and object of the Act itself...*The title and preamble*, whatever their value might be as aids to the construction of a statute, undoubtedly throw light on the intent and design of the legislature and indicate the scope and purpose of the legislation itself."

The following words of Blackburn, J. were repeated in *Rein* v. *Lane* 36 L. J. Q. B. 81 :—

"It is in accordance with the general rule of construction in every case that you are not only to look at the words but you are to look at the context, the collection and the object of such words relating to such a matter, and interpret the meaning according to what would appear to be the meaning intended to be conveyed by the use of the words under such circumstances."

In view of the dispute as to the connotation of an expression and in the absence of any definition of the word in the Act itself, it

becomes necessary to invoke the aid of the *dictionaries* and though they are not authoritative exponents of the meanings of the term used by the legislature, yet they form useful guides in cases in which popular or current meaning of the expression has to be ascertained. There still remains to be seen in which sense the expression was used by the legislature (*Kapildeoram Baijnath Prasad* v. *J. K. Das*, A. I. R. 1954 Assam 170 at page 174).

**Same words given in different enactments.**—"No doubt when we have to ascertain what a particular word used in a statute means, as also the scope of its content, it would be legitimate to examine the sense in which it is used in other enactments." (*Chaparala Krishna Brahman* v. *Guduru Govardhania*, (1954) 25 I. T. R. 407 ; A. I. R. 1954 Mad. 822). One of the rules of construction is that when the legislature uses a term, the Court must construe it in the sense in which it is understood in the country, and not elsewhere. (*Kalyani & Co.* v. *Commissioner of Sales Tax*, A.I.R. 1953 Hyd. 252),

**Amendments.**—The alteration must be deemed to have been made deliberately when an amending Act alters the language of the principal Act. (*D. R. Fraser* v. *Minister of National Revenue*, A. I. R. 1949 P. C. 120).

Acceptance or rejection of amendment to a Bill in the course of parliamentary proceeding does not form part of the legislative history of a statute. (*Aswini Kumar Ghose* v. *Arbinda Bose*, A.I.R. 1952 S. C. 369; (1953) S.C.R. 1 ; 1952 S.C.A. 683 ; 1952 S.C.J. 568). When a subsequent Act amends an earlier one in such a way as to incorporate itself, or a part of itself, into the earlier, then the earlier Act must thereafter be read and construed (except where that would lead to inconsistency or absurdity) as if the altered words had been written into the earlier Act and the old words scored out so that thereafter there is no need to refer to the amending Act at all. (*Shamrao V. Parulekar* v. *District Magistrate*, A. I. R. 1952 S. C. 324 ; (1952) S. C. R. 683 ; 53 Cr. L. J. 1503). When an amended Act is applied subsequent to the date of the amendment, the various unamended provisions of the Act should be read along with the amended provisions. (*Shri Ram Narain* v. *Simla Banking & Industrial Co. Ltd.*, A. I. R. 1956 S. C. 614).

**Marginal notes** —Marginal notes in a statute cannot be referred to for the purpose of construing the statute (*C. I. T.* v. *Ahmedbhai Umarbhai & Co.* [1950] 18 I. T. R 472 (S. C.) ; 52 Bom. L. R. 719 ; A. I. R. 1950 S. C. 134).

Marginal note cannot control the meaning of the body of the section if the language employed therein is clear and unambiguous.

(*Nalinakhya Bysack v. Shyam Sunder Haldar*, A. I. R. 1953 S. C. 148 ; (1953) S. C. R. 533 ; 1953 S. C. A. 191 ; 1953 S. C. J. 201).

The marginal note to an Article furnishes some clue as to the meaning and purpose of the Article. (*Per* majority in *Bengal Immunity Co. Ltd.* v. *State of Bihar*, A. I. R. 1955 S. C. 661 ; (1955) 2 S. C. R. 603-1955 S. C. J. 672 ; 1955 S. T. C. 446).

**Exceptions or Provisos.**—It was pointed out by Lust J., in the case of *Mullins* v. *Treasurer of Surray*, (1880) 5 Q. B. D. 173 :

"The natural presumption is that but for the proviso, the enacting part of the section, though framed as provisos to preceding sections,may contain matter which in substance is a fresh enactment, which adds to, and not merely qualifies, what has gone before."

A proviso does not control the substantive enactment. (*West Derby Union* v. *Metropolitan Life Society*, 1897 A. C. 647 and *C. I. T.* v. *Murlidhar Mathurawalla Assn.*, 1948 I. T. R. 146 ; A. I. R. 1948 Bom. 403).

An exception or proviso can only be engrafted for the purpose of excluding from the substantive part of the section certain matters which but for the proviso would be within it. (*Behram Khursheed Pesikaka* v. *State of Bombay*, A. I. R. 1955 S. C. 123 ; (1955) I. S. C. R. 613 ; 1955 S. C. A. 1 ; 1855 Cr. L. J. 215 ; (1955) I M. L. J. 32).

A proviso carves out an exception to the main provision to which it is enacted as a proviso and to no other. (*Ram Narain & Sons Ltd.* v. *Assistant Commissioner of Sales Tax*, A. I. R. 1955 S. C. 765 ; (1955) 2 S. C. R. 483 ; 1955 S. T. C. 627).

**Schedules.**—Schedule is as much a part of the statute and is as much an enactment as any other part. [(1871) 3 Ex. D. 229].

**Illustrations.**—They are treated as part of the enactment (*Lal Balla Mal* v. *Ahmad Shah*, 16 A. L. J. 905). They have been held, however, not to control or modify the language of a section, though they certainly afford guidance to its construction, or exemplify the meaning of the provision to which they are attached. (*Jadhav Kumar Liladhar* v. *Puspa Bai*, A. I. R. 1944 Bom. 29 and *Scottish Union National Insurance Co.* v. *Roshan Jahan*, A. I. R. 1945 Oudh 152).

An illustration to a section does not exhaust the full content of the section but it cannot curtail or expand its ambit. (*Shambhu Nath Mehra* v. *State of Ajmer*, A. I. R. 1955 S. C. 404 ; (1956) S. C. R. 199).

**Meaning of the Language.**—Hardship or inconvenience cannot alter the meaning of the language employed by the Legislature if such meaning is clear on the face of the statute or the rules. (*Commissioner of Agricultural Income-Tax, West Bengal* v. *Keshab Chandra Mandal*, A. I. R. 1950 S. C. 265-1950 S. C. J. 364; 1950 S. C. R. 435; (1950) 18 I. T. R. 569).

If the language of an Article of the constitution is plain and unambiguous and admits of only one meaning, then the Court shall adopt that meaning irrespective of the inconvenience that such a construction may produce. (*State of Punjab* v. *Ajaib Singh*, A. I. R. 1953 S. C. 10; (1953) S. C. R. 254).

Recourse to the rules of construction is necessary only when a statute is capable of two interpretations, but where the language is clear and the meaning plain, effect must be given to it. (*Thakur Amar Singhji* v. *State of Rajasthan*, A. I. R. 1955 S. C. 504; (1955) 2. S. C. R. 303).

**Title.**—Title of a Chapter cannot be used to restrict the plain terms of an enactment. (*C. I. T., Bombay* v. *Ahmedbhai Umarbhai & Co.*, A. I. R. 1950 S. C. 134). Title of a statute forms part of an enactment and can be used for ascertaining its general scope but it cannot override the clear meaning of the enactment. (*Aswini Kumar Ghose* v. *Arabinda Bose*, A. I. R. 1952 S. C. 369; (1953) S. C. R. 1).

**Debates and Speeches.**—It is not proper to take into consideration the individual opinion of members of Parliament or convention to construe the meaning of the particular clause. But when a question is raised whether a certain phrase or expression was up for consideration at all or not, a reference to the debates may be permitted. (*A. K. Gopalan* v. *State of Madras*, A. I. R. 1950 S. C. 27; 51 Cr. L. J. 1383; 1950 S. C. R. 88; (1950) 2 M. L. J. 42).

A speech made in the course of the debate on a Bill can at best be indicative of the subjective intent of the speaker but it cannot reflect the inarticulate mental processes lying behind the majority vote which carried the Bill. (*A. K. Gopalan* v. *State of Madras, ibid*).

The speeches made by the members of the Constituent Assembly in the course of debates on the draft Constitution of India cannot be used for interpreting the Constitution. (*State of Travancore-Cochin* v. *Bombay Company Ltd.*, A. I. R. 1952 S. C. 366; (1952) S. C. R. 1112). Speeches made by the members of the House of Parliament in the course of debate are not admissible as extrinsic aids to the interpretation of statutory provisions (*Aswini Kumar Ghose* v. *Arabinda Bose*, A. I. R. 1952 S. C. 369; (1953) S. C. R. 1).

**Legislative Proceedings.**—Cannot be referred to for the purpose of construing an Act or its provisions but they are relevant for the proper understanding of the circumstances under which it was passed and the reasons which necessitated it. (*Per* Fazl Ali, J. in *Charanjit Lal Chowdhury* v. *The Union of India*, A. I. R. 1951 S. C. 41 ; 1951 S. C. J. 29).

**Statement of Objects and Reasons.**—The Statement of objects and reasons appended to the Bill are not admissible as aids to the construction of a statute. (*Aswini Kumar Ghose* v. *Arabinda Bose*, A. I. R. 1952 S. C. 369 ; (1953) S. C. R. 1 ; 1952 S. C. A. 683). The statement of objects and reasons can be referred to for the limited purpose of ascertaining the conditions prevailing at the time which actuated the sponsor of the Bill to introduce the same and the extent and urgency of the evil which he sought to remedy. (*M. K. Ranganathan* v. *Government of Madras*, A. I. R. 1955 S. C. 604 ; (1955) 2 S. C. R. 374 ; 1955 S. C. J. 515).

**Preamble.**—The preamble of a statute is a good means of finding out its meaning. (*A. Thangal Kunju Mudaliar* v. *M. Venkatachalam Potti*, A. I. R. 1956 S. C. 246 ; (1955) 2 S. C. R. 1196 ; 1956 S. C. J. 323).

The Consolidating and Amending Act, according to the preamble, forms a code complete in itself and exhaustive of the matters dealt with therein. (*Ravulu Subba Rao* v. *C. I. T., Bombay*, A. I. R. 1956 S. C. 604 ; (1956) S. C. R. 577).

The title and preamble throw light on the intention and design of the legislature and indicate the scope and purpose of the legislation itself. (*Poppatlal Shah* v. *State of Madras*, A. I. R. 1953 S. C. 274 ; (1953) S. C. R. 677 ; 54 Cr. L. J. 1105 ; 1953 S. T. C. 188).

**Punctuation.**—Punctuation cannot be allowed to control the plain meaning of a text. (*Aswini Kumar Ghose* v. *Arabinda Bose*, A. I. R. 1952 S. C. 369 ; (1953) S. C. R. 1).

**Non-obstante clause.**—The non-obstante clause can reasonably be read as overriding anything contained in any relevant existing law which is inconsistent with the new enactment. (*Aswini Kumar Ghose* v. *Arabinda Bose*, A. I. R. 1952 S. C. 369 ; 1952 S. C. J. 568).

The non-obstante clause need not necessarily and always be co-extensive with the operative part of the section if it has the effect of cutting down the clear terms of an enactment. (*Dominion of India* v. *Shrinbai A. Irani*, A. I. R. 1954 S. C. 596 ; (1955) 1 S. C. R. 206 ; 1954 S. C. J. 813).

**Words.**—It is the duty of the courts to give effect to the meaning of an Act when the meaning can be fairly gathered from the words used. (*Shamrao V. Parulekar* v. *District Magistrate, Thana,* A. I. R. 1952 S. C. 324 ; (1952) S. C. R. 683).

The Legislature does not intend to make a substantial alteration in the law beyond what it explicitly declares either in express words or by clear implication. (*M. K. Ranganathan* v. *Government of Madras,* A. I. R. 1955 S. C. 604 ; (1955) 2 S. C. R. 374).

It is not the duty of the Court to stretch the words used by the Legislature to fill in gaps or omissions in the provisions of an enactment. (*Smt. Hira Devi* v. *District Board, Shahjahanpur,* A. I. R. 1952 S. C. 362 ; 1952 S. C. J. 533 ; 1952 A. L. J. 717).

The same word appearing in the same section of the same set of rules must be given the same meaning unless there is anything to indicate the contrary. *K. N. Guruswamy* v. *State of Mysore,* A. I. R. 1954 S. C. 592 ; (1955) 1 S. C. R. 305 ; I. L. R. 1955 Mys. 279). Words should be read in their ordinary, natural and grammatical meaning. Words in a constitutional enactment conferring legisative powers should, however, be construed most liberally and in their widest amplitude. (*Navin Chandra Mafatlal* v. *C. I. T., Bombay City,* A. I. R. 1955 S. C. 58 ; (1955) 1 S. C. R. 829 ; 26 I. T. R. 758).

When two words of different import are used in a statute in two consecutive provisions, it cannot be maintained that they are used in the same sense. *Member, Board of Revenue* v. *Arthur Paul Benthall,* A. I. R. 1956 S. C. 35 ; (1955) 2 S. C. R. 842).

Words of a general nature following specific and particular words should be construed as limited to things which are of the same nature as those specified and not its reverse, that specific words which precede are controlled by the general words which follow. (*Thakur Amar Singhji* v. *State of Rajasthan,* A. I. R. 1955 S. C. 504 ; (1955) 2 S. C. R. 303).

**Spirit of law.**—Recourse cannot be had to the spirit of the constitution when its provisions are explicit in respect of a certain right or matter. *State of Bihar* v. *Sir Kameshwar Singh,* A. I. R. 1952 S. C. 252 ; 1952 S. C. R. 889 ; 1953 S. C. A. 53 and *Raja Suriya Pal Singh* v. *State of U. P.* (1952) S. C. R. 1056).

Court should gather the spirit of the constitution from the language of the constitution. (*Keshavan Madhava Menon* v. *The State of Bombay,* A. I. R. 1951 S. C. 128 ; 1951 A. L. J. 23 ; (1951) 1 M. L. J. 370 ; I. L. R. (1951) Hyd. 294).

The spirit of law cannot be given effect to in opposition to the plain language of the sections of the Act. (*Rananjaya Singh* v.

*Baijnath Singh*, 1954 A. L. J. 759 (S. C.) ; A. I. R. 1954 S. C. 749 ; (1952) 2 M. L. J. 714 ; (1955) 1 S. C. R. 671).

**Delegation.**—No judicial tribunal can delegate its functions unless it is enabled to do so expressly or by necessary implication. (*Pradyat Kumar Bose* v. *The Hon'ble Chief Justice of Calcutta High* Court 1956 S. C. 285).

**Mandatory and directory provisions.**—It is one of the rules of construction that a provision of a statute is not mandatory unless non-compliance with it is made penal. (*Jagan Nath* v. *Jaswant Singh*, A. I. R. 1954 S. C. 210 ; (1954) 1 M. L. J. 480). An enactment mandatory in form might in substance be directory, and the use of the word "shall" does not conclude the matter. (*Hari Vishnu Kamath* v. *Ahmad Ishaque*, A. I. R. 1955 S. C. 233 (1955) 1 S. C. R. 1104 ; 1955 Nag. L. J. 1). Mandatory provisions must be strictly observed while it is sufficient if the directory provision is substantially complied with. (*ibid*). It is the substance that counts and must take precedence over mere form. Some rules are vital, while others are merely directory and a breach of them can be overlooked, provided there is substantial compliance with the rules read as a whole and no prejudice ensues. (*Pratap Singh* v. *Shri Krishna Gupta*, A. I. R. 1956. S. C. J. 140 ; (1955) 2 S. C. R. 1029 ; 1956 S. C. J. 140 ; 1956 S. C. A. 366).

**Penal provisions.**—Penal section in an enactment must be strictly construed in favour of the subject and the courts are not concerned so much with what might possibly have been intended as with what has been actually said in and by the language employed. (*W. H. King* v. *Republic of India*, A. I. R. 1952 S. C. 156 ; (1952) S. C. R. 418 ; 1952 S. C. J. 133 ; 53 Cr. L. J. 836). In a penal statute the court shall interpret words of ambiguous meaning in a broad and liberal sense. (*Seksaria Cotton Mills Ltd.* v. *State of Bombay*, A. I. R. 1953 S. C. 278 ; (1953) S. C. R. 825 ; 54 Cr. L. J. 1116). If two possible and reasonable constructions can be put upon a penal provision, the court must lean towards that construction which exempts the subject from penalty rather than the one which imposes penalty. (*Tolaram Rebemal* v. *State of Bombay*, A. I. R. 1954 S. C. 496 ; (1955) 1 S. C. R. 158).

**Directions in Manuals.**—Directions contained in the Income-tax Manual in force are not proper guide in construing the Income-tax Act. (*C. I. T., Madras* v. *K. Srinivasan*, A. I. R. 1953 S. C. 113 ; 1953 I. T. C. 237 ; 23 I. T. R. 87).

**Legislative intention.**—The language used by the legislature in an enactment is the true depository of the legislative intent. (*Darshan Singh* v. *State of Punjab*, A. I. R. 1953 S. C. 83 ; (1953) S. C. R. 319). To ascertain the legislative intent, all the constituent parts of an Act should be taken together and each word, phrase

or sentence should be considered in the light of the general purpose and object of the Act itself. (*Poppatlal Shah* v. *State of Madras*, A. I. R. 1953 S. C. 274 ; 1953 S. T. C. 188). When the Legislature does not intervene in the interpretation of any section put by the High Court, it is legitimate to infer that the view expressed by the court is in accord with the intention of the Legislature. (*Ram Nandan Prasad Narayan Singh* v. *Kapildeo Ramjee*, A. I. R. 1951 S. C. 155 ; 1951 S. C. J. 199 ; 30 Pat. 310). The primary duty of a court is to give effect to the intention of the legislature as expressed in the words used by it and no outside consideration should be called in aid to find that intention. (*The New Piecegoods Bazar Co., Ltd.* v. *C. I. T., Bombay*, A. I. R. 1950 S. C. 165 ; (1950) 18 I. T. R. 516).

**General and special law.**—When there is a general law and a special law dealing with a particular matter, the special excludes the general. (*Kedar Lal Seal* v. *Hari Lal Seal*, A. I. R. 1952 S. C. 47 ; (1952) S. C. R. 179 ; (1952) 1 M. L. J. 431). The general rule and the special rule should relate to the same subject. (*Bengal Immunity Co. Ltd.* v. *State of Bihar*, A. I. R. 1955 S. C. 661 ; (1955) 2 S. C. R. 603 ; 1950 S. C. J. 672 ; 1955 S. T. C 446).

**Repeal of statute.**—If a later statute again describes an offence created by a previous one and imposes a different punishment or varies the procedure, the earlier statute is repealed by the later statute. (*Zaverbhai Amaidas* v. *State of Bombay*, A. I. R. 1954 S. C. 752 ; (1955) 1 S. C. R. 799 ; 1954 Cr. L. J. 1822 ; 1955 A. W. R. (Supp.) 1). When a statute is repealed or comes to an automatic end by efflux of time, no prosecution for acts done during the continuance of the repealed or expired Act can be commenced after the date of its repeal or expiry. This rule is modified by section 6 of the General Clauses Act in the case of repeal of statutes but the said section does not apply to an expired Act. (*State of Uttar Pradesh* v. *Seth Jagamander Das*, A. I. R. 1954 S. C. 683 ; 1954 Cr. L. J. 1736 ; 1955 S. C. A. 539). When a statute is repealed and re-enacted and words in the repealed statute are reproduced in the new statute, they should be interpreted in the same sense as has been under the repealed Act. (*Per* Venkatarama Ayyar, J., in *Bengal Immunity Co. Ltd.* v. *State of Bihar*, A. I. R. 1955 S. C. 661 ; 1955 S. C. J. 672).

**Rules.**—Rules framed under the Act and brought into force simultaneously must be read as a part of the Act. (*State of Bombay* v. *The United Motors (India) Ltd.* A. I. R. 1953 S. C. 252 ; 1953 S. T. C. 133 ; 55 B. L. R. 1069). Some rules may be vital while others only directory. (*Pratap Singh* v. *Shri Krishna Gupta*, A. I. R. 1956 S. C. 140).

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the Supreme Court of India that an arbitration agreement in writing need not be signed by the parties, and it is enough if the terms are reduced to writing and the agreement is established. (*Jugal Kishore Rameshwardas* v. *Mrs. Goolbai Hormusji*, A. I. R. 1955 S. C. 312 ; (1955) 2 S. C. R. 647 ; 58 B. L. R. 486).

**Who may refer matters to arbitration.**—It is an elementary rule that as submission to arbitration is a contract, the parties thereto must not only have a general legal capacity to contract but they must also have such power in relation to the subject-matter of the submission as will enable them to carry into effect any order which could be legally and properly laid upon them by the award. In other words, capacity to make submission is co-extensive with capacity to contract. (*Soudamini Ghosh* v. *Gopal Chandra*, 28 I. C. 557 ; 19 C. W. N. 948). Every person capable of entering into a contract may be a party to submission ; conversely, he who cannot contract, cannot make a submission. As it is not competent to a minor to enter into a contract, there cannot be a valid submission to arbitration by him. (*Mohiribibi* v. *Dharam Das*, 30 I. A. 114).

It is competent to the father of a joint Hindu family in his capacity of managing member of the family to refer to arbitration a dispute relating to joint family property, and the award made on such a reference, if in other respects valid, will be binding on the other members of the family (say, sons). (*Jagannath* v. *Manu Lal*, 16 All. 231 and *Raja Ram* v. *Gopi Nath*, A. I. R. 1931 All. 721). Therefore, an agreement to refer to arbitration by the manager of the joint Hindu family is an arbitration agreement under the Arbitration Act and is valid.

Reference to arbitration by a natural guardian of a minor is legal since he has power to submit to arbitration. (*Ram Krishan* v. *Hanman Lal*, 19 Cal. 334 ; *Ramavtar* v. *Langat*, A. I. R. 1931 Pat. 92 ; *Vithal* v. *Data Ram*, 26 Bom. 298). Though the parties to the arbitration are major and minor, the arbitration is not void. (*Firm Kapur & Sons* v. *Raj Kumar*, A. I. R. 1955 Punjab 238). Objection to the arbitration agreement on the ground of minority of a party should be raised when application under section 20 is made. It cannot be made after an award has been filed in the court. (*ibid*).

**Reference by companies.**—Section 389 of the Companies Act, 1956 provides as follows :—

"389. **Power for companies to refer matters to arbitration.**—(1) A company may, by written agreement, refer to arbitration, in accordance with the Arbitration Act, 1940 (X of 1940), an existing or future difference between itself and any other company or person.

"(2) A company which is a party to an arbitration may delegate to the arbitrator power to settle any terms or to determine any matter, capable of being lawfully settled or determined by the company itself, or by its Board of directors, managing directors managing agents, secretaries and treasurers, or manager.

"(3) The provisions of the Arbitration Act, 1940 (X of 1940), shall apply to all arbitrations in pursuance of this Act to which a company is a party."

**Reference under Religious Endowment Act.**—Section 16 of the Religious Endowment Act, 1863 enacts : "In any suit or proceeding instituted under this Act it shall be lawful for the Court before which such suit or proceeding is pending to order any matter in difference in such suit to be referred for decision to one or more arbitrators. Whenever any such order shall be made, the provisions of Chapter IV of the Arbitration Act, 1940, shall, in all respects, apply to such order and arbitration, in the same manner as if such order had been on the application of the parties under section 21 of the said Act."

Section 17 of the Religious Endowment Act provides :

"Nothing in the last preceding section shall prevent the parties from applying to the court or this court for making the award of reference under section 21 of the Arbitration Act of 1940."

Under section 16 of the Act of 1863, a court may refer any matter in difference in the suit for decision by an arbitrator but it is not open to the Court to refer the whole suit. (*Karedla Vijaya* v. *Sita Ramiya*, 26 Mad. 361).

**Reference by trustees.**—Power is given to a trustee to submit to arbitration by section 43 (*c*) of the Indian Trusts Act which provides that two or more trustees acting together may, if and as they think fit, compromise, compound, abandon, submit to arbitration or otherwise settle any debt, account, claim or thing whatever relating to the trust.

The powers conferred by section 43 of the Trusts Act on two or more trustees acting together may be exercised by a sole acting trustee when, by the instrument of trust, if any, a sole trustee is authorized to execute the trusts and powers thereof. Section 43 of the Trusts Act applies only if and as far as a contrary intention is not expressed in the instrument of trust, if any, and shall have effect subject to the terms of that instrument and to the provisions therein contained.

**Arbitration by lunatic.**—A person of unsound mind is incapable of entering into a contract. Section 12 of the Indian Contract Act has defined 'sound mind' for the purpose of contracting thus :

"A person is said to be of sound mind for the purpose of making a contract if, at the time when he makes it, he is capable of understanding it and of forming a rational judgment as to its effect upon his interest.

"A person who is usually of unsound mind but occasionally of sound mind, may make a contract when he is of sound mind.

"A person who is usually of sound mind but occasionally of unsound mind may not make a contract when he is of unsound mind."

**Reference by agent.**—The recognised agent of a party has power to refer the matter in dispute to arbitration. (*Ahmed* v. *Bhagban*, 170 P. R. 1883 ; *Unniraman* v. *Chathan*, 9 Mad. 451). A person who is not a recognized agent but is simply authorized by *Mukhtarnama* to look after the case, is not competent to make an application for reference. (*Bhagwan* v. *Nanda*, 12 Cal. 173). But when a principal is aware of the reference to arbitration on the application of his agent not authorised to do so, and tacitly ratifies the action of the agent in applying for such reference, he cannot then question the legality of the order of reference. (*Satrujit* v. *Dulhir*, 24 Cal. 469 and *Unniraman* v. *Chathan*, 9 Mad. 451).

The authority of an agent to make a submission may be express or implied. There is no law requiring that the agent's authority should be in writing.

**Reference by lawyers to arbitration.**—In *Muthiah* v. *Karuppan*, A. I. R. 1927 Mad. 852 ; 50 Mad. 786 ; 105 I. C. 5, Kumaraswami Sastri, said :

"(1) A counsel has authority to make admissions in court on behalf of his client on matters of fact relevant to the issues in the case in which he is engaged.

"Admissions on questions of law will not bind the client.

"(2) A counsel has authority to confess judgment, withdraw or compromise, or refer to arbitration the suit in which he is instructed, if his doing so is for his client's advantage or benefit, even though he has no express authority from his client.

"(3) A counsel cannot without express authority agree to compromise or refer to arbitration matters unconnected with the subject-matter of the suit in which he is instructed.

"(4) Where in the course of a suit, a counsel makes an admission as to a collateral matter or gives up a doubtful claim which is not a subject-matter of the suit, there is a presumption that the counsel acts under instructions if the admission or the giving up of the doubtful claim is for the benefit of the client.

"(5) It is a question of fact in each case whether the counsel acts under instructions when he compromises or refers to arbitration matters not involved in the suit and the Court, on consideration of the probabilities and the circumstances of the case, can find that the counsel acted on instructions even though there is no direct evidence on the point.

"(6) A counsel has no power to make an admission in or compromise or refer to arbitration a suit if he is instructed not to do so, without express authority from his client."

According to Mr. Sarkar, however large the powers of the lawyer engaged in the case may be, such powers are confined to the conduct of the proceedings in the tribunal before whom he has been authorised to appear. He has no power to refer to arbitration, which means sending the matter to another tribunal for disposal. (Sarkar, The Law of Arbitration, p. 46).

An attorney or a solicitor engaged in a case has no implied authority to refer the dispute to arbitration unless he is specially authorised for that purpose. (*Rajendra* v. *Panna*, A. I. R. 1932 Cal. 343 ; 138 I. C. 381).

A pleader has no authority to apply for making a reference to arbitration unless his *vakalatnama* is so worded as to give him the authority specially. A pleader expressly authorised to refer to arbitration cannot delegate his power to refer to arbitration to another pleader without express authorisation to that effect. (*Aziz Din* v. *Moti Ram*, A. I. R. 1926 Lah. 563 ; 96 I. C. 277). Where power of attorney authorising pleader to refer suit for arbitration has already been given, further consent before actual reference is not necessary. (*Hari Shankar* v. *Amraoti*, A. I. R. 1944 Lah. 280). Absence of a party's signature on the application for reference does not invalidate the award where the pleader who was conducting the case on his behalf and who had been specially authorised in the *vakalatnama* to refer the suit to arbitration, had actually affixed his signature to the application and the party had appeared before the arbitrator during the proceedings. (*Guran Ditta* v. *Pokhar Ram*, A. I. R. 1927 Lah. 362 ; 104 I. C. 202).

(1942) A. C. 356, the law on the subject has been very clearly stated in the following passage :

"An arbitration clause is a written submission; agreed to by the parties to the contract, and, like other written submissions to arbitration, must be construed according to its language and in the light of the circumstances in which it is made. If the dispute is as to whether the contract which contains the clause has ever been entered into at all, that issue cannot go to arbitration under the clause, for the party who denies that he has ever entered into the contract is thereby denying that he has ever joined in the submission. Similarly, if one party to the alleged contract is contending that it is void *ab initio* (because, for example, the making of such a contract is illegal), the arbitration clause cannot operate, for on this view the clause itself is also void.

If, however, the parties are at one in asserting that they entered into a binding contract, but a difference has arisen between them as to whether there has been a breach by one side or the other, or as to whether circumstances have arisen which have discharged one or both parties from further performance, such differences should be regarded as differences which have arisen *in respect of* or *with regard to* or *under* the contract, and an arbitration clause which uses, or similar expressions, should be construed accordingly."

The Supreme Court of India has also held that if a party has to have recourse to the contract which contains the arbitration clause, the dispute raised is a dispute under the contract and falls within the arbitration clause, and the arbitrator has jurisdiction in respect of such dispute. (*A. M. Mair & Co.* v. *Gordhandas Sagarmull* A. I. R. 1951 S. C. 9 ; (1950) S. C. R. 792 ; 1951 A. L. J. (S. C.) 124). Section 33 of the Arbitration Act does not apply under these circumstances.

The arbitration clause does not come into operation until a dispute arises under or out of the contract. If there is no dispute, there is no operation of the arbitration clause. Therefore the arbitration clause is not in a sense an integral part of the contract. (*State of Bombay* v. *Adamjee*, A. I. R. 1951 Cal. 147). But the parties are not bound to have recourse to arbitration. They may settle the dispute directly and agree not to invoke the arbitration clause for that purpose. They may also enter into a substituted agreement in complete supersession of the original contract and thereby abrogate the contract and the arbitration clause contained in it. (*Union of India* v. *Kishori Lal*, A. I. R. 1953 Cal. 642).

**Arbitrator named or not.**— It is not necessary that an arbitrator should be named in the agreement. An agreement is

not ambiguous merely because the arbitrators are not specially named in it. (*Tara Chand* v. *Faras Ram*, A. I. R. 1930 Sind 202).

**Distinction between an arbitrator and a referee.**—An agreement that parties will abide by the statement of a witness who has been designated as a referee, is enforceable in law; and as pointed out by the Court in the case *Suroj Narain* v. *Beni Madho*, A. I. R. 1937 All. 701 : 171 I. C. 697, there is nothing in law to prevent the parties to a suit from agreeing, apart from the Oaths Act, to abide by the statement of a third party.

The question arises whether such an agreement amounts to—

(1) a reference under the Oaths Act;

(2) a reference to arbitration;

(3) a mutual admission of the parties creating an estoppel; or

(4) if carried out, an adjustment of the claim.

These points have been elaborately dealt with in the Special Bench decision of the Allahabad High Court in the case *Akbari Begum* v. *Rahmat Hussain*, A. I. R. 1933 All. 861 at p. 879 ; 56 All. 39 ; 1933 A. L. J. 1127 ; 146 I. C. 84. In this case Sulaiman, C. J. observed :

"I hold that an agreement to abide by the statement of a particular witness is in substance not a reference to arbitration. The essence of arbitration is that the arbitrator decides the case and his award is in the nature of a judgment which is later on incorporated in a decree of the court. The arbitrator can either proceed on the basis of his own knowledge or make enquiries and take evidence and then give his decision on such evidence. But where parties agree to abide by the statement of a third person or a referee, the referee makes a statement according to his knowledge or belief and the Court then decides the case and pronounces its judgment on the basis of such a statement and passes a decree thereon. The referee is not authorised to make enquiries and to take evidence and then to announce his decision on the basis of such evidence. He is called upon to make statement according to his knowledge or belief. In the case of an arbitration, as the arbitrator's award is an expression of an opinion and his procedure resembles that of a court, a party is entitled to file objections and challenge the validity of the award. The making of a statement by a referee or a third person has no resemblance to a proceeding conducted by him as if he were a court of law, and accordingly there can be no procedure for filing objections as to its validity." (*vide* also *Lakshmi Narain* v. *Ram Babu* A. I. R. 1953 All. 9 at p. 13).

In the case *Suraj Narain* v. *Beni Madhab*, A. I. R. 1937 All. 701 ; 1937 A. L. J. 1066, the parties to a suit appointed a person as a referee with respect to their dispute and agreed to abide by the statement of such person made in Court after making necessary inquiry and the referee was authorized to take oral evidence and to inspect documents filed in Court. On such inquiry, the referee made a statement in Court, but unlike the arbitrator on oath. The Allahabad High Court held that the referee was not an arbitrator and observed :

"It is argued by the learned counsel for the applicant that B. Brij Behari Lal was authorised to perform acts of a judicial character, he was not a referee but an arbitrator, and this contention derives some support from certain dicta of the Chief Justice quoted from page 1155 of the case *Akbari Begam* v. *Rahmat*, A. I. R. 1933 All. 861. On the other hand, the parties to the present suit allowed the referee to be examined on oath, and no oath is administered to an arbitrator who is merely to file his award. It is perhaps difficult to say exactly what his proceeding was ; it apparently partook of various elements. We think that it is obvious, however, that it was never the intention of the parties that there should be a reference to arbitration ; their intention was that their nominee should make an enquiry and that they would be bound by whatever statement he might make in court."

But if the parties agree to refer their dispute to a third person for decision and that person has to do some judicial or quasijudicial work, he will be held to be an arbitrator. (*Mohammad* v. *Usman*, A. I. R. 1935 Cal. 239).

In the case *Baijnath* v. *Narayan*, A. I. R. 1927 All. 614, the parties to a suit stated that they would accept statement about which certain pleaders of the Court whose names were mentioned, would make without taking an oath. The pleaders were to decide all the points in dispute and were also to dispose of the question of cost on the statement of the parties. The Court referred the case to the pleaders. They filed a written statement which showed that they themselves had regarded their functions as those of arbitrators, for they said that the dispute of each party was to be decided separately and the *bahis* be inspected and examined, which took considerable time. It was held that the whole proceeding was one of arbitration.

An agreement to abide by the statement of a certain individual nominated by the parties to a proceeding amounts to an agreement to accept an adjustment of the case which may ensue as a result of the statement made by the nominee, the said statement furnishing the agreed data on which the adjustment is to be found-

ed. (*Vasudeo* v. *Ram Raj*, A. I. R. 1932 All. 166 ; 137 I. C. 263 ; 1932 A. L. J. 71).

**Distinction between valuer and arbitrator.**—In the case *In re Carus Wilson and Greene*, (1886) L. R. 18 Q. B. D. 7, Lindley, L. J., said :

"A valuer may be in one sense called an arbitrator, but not in the legal sense of the term. In the ordinary cases of arbitration, there is a dispute which is referred. The object of the valuation, on the other hand, is to avoid dispute."

Lord Esher, M. R., said in the case ;

"If it appears from the terms of the agreement, by which a matter is submitted to any person, that that which he is to do is to be in the nature of a judicial inquiry, and that the object is that he should hear the parties and decide the matter upon evidence to be led before him, there the person is an arbitrator. But if it appears that the object of appointing the person was not to settle differences after they had arisen but to preclude differences from arising, there the person appointed is not an arbitrator. There is an intermediate class of cases in which a person is appointed to determine disputes after they have arisen but is not bound to have evidence or argument. In those cases it may be more difficult to say whether the person is a valuer or an arbitrator. They must be determined according to the circumstances in each particular instance by the intention of the parties."

In the case *Chooney Money Dassee* v. *Ram Kinkar Dutt* 28 Cal. 155, Maclean, C. J., observed as follows :

"It may well be that it was intended in making that order of reference to the referee, to make one under section 506, but obviously it cannot be properly regarded as one under that section, for what the so-called arbitrators and umpire were to decide was not any matter in difference between the parties in the suit but merely to settle the price of the plaintiff's share and interest in the disputed property. They were in effect rather valuers than arbitrators."

In the case *Hormusji* v. *District Local Board*, A. I. R. 1934 Sind 200 ; 153 I. C. 361, the Court observed as follows :

"One of the essential ingredients of a submission to arbitration is that the parties should intend that the dispute intended to be referred should be determined in a quasi-judicial manner. Halsbury's *Laws of England*, Vol. I, page 1071). If it is not to be so

determined, the agreement does not amount to a submission to arbitration and the person who decides the dispute is not an arbitrator. Therein lies the distinction between an agreement to accept the decision of a valuer or appraiser or of a racing steward or of the counsel of the parties (and a submission to arbitrator). In all such cases, there is no *animus arbitrandi*."

In *Wordsworth* v. *Smith*, (1871) 6 Q. B. 332 ; 40 L. T. Q. B. 118, Blackburn, J., said :

"Where by an agreement the right by one of the parties to have or do a particular thing is made to depend on the determination of a third person, that is not a submission to arbitration, nor the determination is an award."

So also where the contract provides for the determination of the claims and liabilities of the contractors by the judgment of some particular persons, this would be incorrectly called a provision for submission to arbitration. (*Scott* v. *Liverpool Corporation*, 28 L. J. Ch. 230).

A clause dealt with the right of the parties at the end of the period of the lease in the event of a fresh lease being not taken. It provided : "You are to give me one month's previous notice before you so intend, appoint one panch on my behalf and you should appointed one panch on your behalf and third should be one panch on behalf of us both." Therefore one M made his report that was called an award. It was held that the parties did not intend to make the person named as arbitrator, and the word 'panch' did not necessarily mean the arbitrator. (*Corsetjee* v. *Ardeshir*, A. I. R. 1943 Bom.).

In *Kennedy Ltd.* v. *Barrow-in-Furness Corporation*, the agreement provided that the engineer was to be exclusive Judge on all matters arising out of the contract and his certificate was to have the force of an award. It was held that the engineer was not an arbitrator. Buckly, J., observed : "The engineer is the person whose determination is required by the parties. It is not a judicial act but it is an administrative act in the interests of the corporation who is going to pay and he is to be the judge, or a kind of arbitrator or a person whose decision is to be final in the matter of the execution of the work. I do not think that means he is an arbitrator or acting in a judicial capacity at all." This case was approved in *Monro* v. *Bognor Urban Council*, (1915) 3 K. B. 167 ; 84 L. J. K. B. 1091 ; 112 L. T. 969).

The distinction between a mere valuation and arbitration is important to be borne in mind. In the case of valuation, the courts

have no jurisdiction to interfere between the parties or to enforce their agreement under the statute applicable to arbitration. (*Collins* v. *Collins*, 28 L. J. Ch. 184). Moreover, an action for negligence would lie against a valuer but not against an arbitrator, (*Turner* v. *Goulden*, 43 L. J. C. P. 60 ; L. R. 9 C. P. 57). A valuation would only require to be stamped as an appraisement and not as an award. (*Leeds* v. *Burrows*, 12 East 1), even though on the form of an award.

**Difference between srbitrator and commissioner.**—The essential difference between a commissioner appointed to effect a partition and an arbitrator is that the former is an officer selected and appointed by the Court whereas the latter is a person selected by the parties. In the former case, the parties express no consent to be bound by the decision of the commissioner and whose decision the parties may challenge before the Court passing a final decree. In the latter case, they express such consent and cannot challenge the decision of the arbitrator on questions of law or fact except on the limited grounds contained in the Arbitration Act. (*Radhey* v. *Kanhai Lal*, A. I. R. 1939 Pat. 526 ; 18 Pat. 193 ; 185 I. C. 52).

The commissioner submits his report for approval of the Court and has no greater power than what the parties and the Court chose to give him ; whereas the arbitrator is the final authority to decide all the matters in difference forming the subject of reference, subject to the powers of the Court to set aside the award on certain grounds.

**Distinction between arbitrator and mediator.**—Where a person is asked to act as mediator in the settlement of a dispute and records a settlement agreed on by the parties, his act is not that of an arbitrator and the record made by him is not an award, and if that record is at all operative it is so only as a contract between those who have signed it. (*Subramania Aiyar* v. *Kalyansundaram*, 538 I. C. 283). The decision of a mediator is binding on the parties and is not irrelevant in a suit involving the subject-matter of the arbitration. (*Ramchandra* v. *Narayanasami*, A. I. R. 1927 Mad. 426 ; 99 I. C. 620).

**Distinction between architect's certificate and arbitration agreement.**—Where a member of the firm of architects is holding an enquiry as to the cost of certain work done in case of a dispute between the owner and the contractor, he acts in his capacity as an arbitrator and is subject to the provisions of the Arbitration Act. (*Harnam Singh* v. *Parasram*, A. I. R. 1938 Sind 45 ; 173 I. C. 401). In this case, clause 6 of the contract read : "In all disputes of whatever nature arising out of this contract, the decision

of the architects should be final and binding against both the parties."

The law on the subject is stated in para 595 of Halsbury's *Laws of Eugland*, Vol. III, Hailsham Edition, thus :

"In cases where the archiect or engineer who has to give a certificate of approval of the work done is also the person designed to act as arbitrator in case of disputes ; it is very important to distinguish between his duties and powers in his capacity as a certifier from those in his capacity as arbitrator. It must also be observed that he may be acting in regard to the same matter at one time in the one capacity and at another time in the other. When the architect or engineer is acting in his capacity as certifier, the provisions of the Arbitration Act do not apply, while he is acting in his capacity as arbitrator, they do."

In Hudson on *Building Contracts*, Edition 6th, p. 506, it is stated :

"Arbitrators may, it is submitted, decide without formally examining witnesses or hearing evidence in cases where—

"(1) they are employed to decide owing to and by the exercise of their skill and knowledge of the subject ;

"(2) there is in the agreement to refer an apparent intention that they should not hear witnesses ;

"(3) there are no facts which should be inquired into beyond those which are within the skill and knowledge of the arbitrators in the particular subject ; or

"(4) the parties do not ask for a hearing or tender any evidence."

**Steward of race, whether an arbitrator.**—The stewards of a horse-race are not in the position of arbitrator between the persons whose horses are in race, and the rules of law applicable to arbitrators do not apply to them. (*Park* v. *Winteringham*, (28 L. J. Q. B. 123 ; *Kalu* v. *Ram*, 3 I. C. 55).

Where the stewards have got jurisdiction to entertain any dispute, their decision is final and supreme and is not liable to be questioned in any court of law, if they give party aggrieved or affected reasonable notice of what he had to answer and an opportunity of being heard. Even if the civil court thinks that the stewards are wrong in their decision, the High Court has no jurisdiction to interfere. The principles of natural justice as applied to

racing only require that the person affected should have reasonable notice of what he has to answer and an opportunity of being heard ; it is not necessary that a charge should be framed against the person affected, that the evidence in support thereof should be led in his presence and that he should have an opportunity to cross-examine the witnesses and to call witnesses in rebuttal. The proceedings before the stewards need not be according to the strict rules of law. The steward has only to observe the rules of natural justice. (*Daryanormal* v. *Karachi Race Club*, I. L. R, (1944) Kar. 364 ; 218 I. C. 385 ; A. I. R. Sind 21).

It is, however, for the civil court to determine whether a certain matter in dispute is within the jurisdiction of the stewards and if so, whether they have acted according to the elementary principles of natural justice and fair play. The jurisdiction of the civil court can only be exercised within these narrow limits (*Royal Calcutta Turf Club* v. *Kishan Chand*, 201 I. C. 619 ; 1942 Lah. 179 ; *Cipriani* v. *Burdlett*, (1933) A. C. 83).

*Clause (b)*

**Award.**—Award under clause (*b*) means an arbitration award. The decision of the arbitrator or arbitrators is called an award. It is an instrument which embodies a decision of an arbitrator or arbitrators as regards matters referred to him or them, (Wharton's *Law Lexican*). It is a paper containing the decision of the arbitrators. (*Webster*).

The arbitrator should determine the matters referred to him in a quasi-judicial manner. That which he is to do is to be in the nature of a judicial inquiry. The object is that he should hear the parties and decide the dispute upon evidence laid before him. (*Carus-Wilson & Grene*, in re, (1886) 56 L. J. Q. B. 530 ; 18 Q. B. D. 7).

An award is a statement by which the arbitrators and umpires convey their findings and decisions regarding the subject-matter of submission or arbitration agreement. It is not a contract inasmuch as the parties to it do not contract with the arbitrator.

An award in order to be valid, must be final, certain, consistent and possible and must decide matters to be submitted and no more than the matters submitted. (*Russell*, page 448). An award ought to be certain so that no reasonable doubt can arise upon the face of it as to the arbitrator's meaning or as to the nature and extent of the duties imposed on it by the parties. If it is doubtful whether the award has decided the question referred, it will be set aside for uncertainty. (*Russell*, page 231).

Where at the time the award or report is made by the arbitrator, the parties are not *ad idem*, and there was an honest difference of a fundamental nature about the subject-matter of the reference itself, the agreement itself will be void for uncertainty, and the award of the arbitrator on such an uncertain reference will be void. (*Laxman* v. *Ram Dulary*, A. I. R. 1952 V. P. 25).

An award going beyond the subject-matter referred is invalid. (*Union of India* v. *Prem Chand*, A. I. R. 1951 Pat. 201).

**Effect of award.**—A valid award operates to merge and extinguish all claims embraced in the submission, and after it has been made, the submission and award furnishes the only basis by which the rights of the parties can be determined, and constitute a bar to any action on the original demand. (*Maung Po* v. *Ma Bu*, A. I. R. 1932 Rang. 459 and A. I. R. 1937 Rang. 225 ; (*Damodar* v. *Basheshar Nath*, A. I. R. 1936 Lah. 865; 167 I. C. 730 and (*Lutufullah* v. *Khudur Baksh*, A. I. R. 1946 Sind 117).

The award having become final puts an end to all the controversies and any one of the parties is not entitled to re-agitate a point which has been taken either in attack or defence on the ground that the arbitrators did not give any finding on it. (*Ganpat Rai* v. *Bhagwat Dayal*, 1937 A. L. J. 1141 and *Damodar Das* v. *Basheshar Nath*, A. I. R. 1936 Lah. 865). Where a court passes a decree in terms of an award it is final. (*Brijlal* v. *Govindram* A. I. R. 1943 Bom. 201 ; I. L. R. (1943) Bom. 366).

An award is binding between the parties in all matters which it professes to decide, and the fact that parties to the award have not carried out its terms is not in law sufficient to deprive the award of its binding effect.

**Whether an award by acceptance becomes an agreement.**—An award continues to be an award notwithstanding the fact that the parties have accepted it. In the Bombay case *Narbada Bai* v. *Natverlal*, A. I. R. 1953 Bom. 386 ; 55 Bom. L. R. 408, Chagla, C. J., said :

"There was no plea of any agreement subsequent to the award. The plea is that the award was accepted and agreed to. At the highest this plea can only mean that the parties agreed not to challenge the award and to abide by the award. But the acceptance of the award and the agreement to abide by the award cannot change the nature of the award. If it was an award, it continued to be an award notwithstanding the fact that the parties have accepted it. It is difficult to accept the contention that merely on the parties abiding by the award and accepting the award, the nature of the award is changed and it became an agreement and the

award was merged in the agreement.....In our opinion, parties appearing before the arbitration may take an award by consent. They may agree not to have the adjudication by the arbitration. They may reduce the terms of agreement to writing and they may ask the arbitrator to promulgate that agreement as an award ; but the mere fact that the parties have agreed to the terms of an award and that there has been no adjudication by the arbitrators does not, in any way, change the nature of the award. Once parties have referred their dispute to a domestic forum, it is that domestic forum alone that can decide upon those disputes. The forum may decide upon those disputes by adjudicating upon those disputes ; it may decide those disputes if the parties consent to take a decision on an agreement. Whether in one case or the other, the decision of the domestic forum, whether by consent or *in invitum* is an award and has all the characteristics of an award."

**Form of award.**—An award must be the result of a judicial decision and when a decision is the result of a discretion and an absolute discretion exercised by a person, that decision cannot in the very nature of things, be an award. Where from the agreement between the parties, it is clear that they intended the person appointed to act as a valuer and not as an arbitrator and that the decision was to be made by him in the absolute discretion, the mere fact that he was bound to observe the principle of natural justice and hear the parties before giving the decision does not make the decision an award. (*Vadilal Thakorelal*, A. I. R. 1954 Bom. 121).

The award need not be a reasoned judicial decision. The arbitrators are not bound to give reasons at all in the award. (*Bhajhari* v. *Behari*, 33 Cal. 881 ; *Ravinder* v. *Mohinder*, A. I. R. 1940 Lah. 186). The award amounts to a judgment in such form as the arbitrator or umpire thinks fit. (*Amir Bibi* v. *Asokyam*, 45 I. C. 813). In the absence of anything to the contrary, no particular word or form is requisite for the validity of an award. Its meaning must be clear. Inaccurate recitals do not affect the validity of an award. (Halsbury's *Laws of England*, Vol. I, page 662).

The award need not record separate finding on various points on which the parties are at difference as such. All that the arbitrator is required to do is to give an intelligible decision which determines the rights of the parties in relation to the subject-matter under reference. (*Nanjapa* v. *Nanjapa*, 16 I. C. 478).

**Construction of award.**—An award should, according to the ordinary rule of law, be read as a whole and portion of it cannot be picked up to show that the finding of the arbitrator was inconsistent with these portions.

If award has referred to certain documents and after construing them the arbitrator has arrived at certain conclusion such document can be looked at. (*Durga* v. *Anardin*, A. I. R. 1947 Cal. 74). The general rule that where a contract is susceptible of two constructions, one of which will render the contract valid and the other invalid, the former will be adopted, applies to the construction of awards also. (*Corpus Juris*, Vol. V, page 124).

The Court leans towards the construction that the award is certain. *Prima facie* the award is good, and it is for the defendant to show that it is uncertain. (*Per* Jervis, C. J., in the case of *Mays* v. *Cannell*, [1854] 24 L. J. Q. B. 41 at p. 45 : 139 E. R. 360).

The arbitrator is not bound to give an award on each point. He can make his award on the whole case. (*Ghulam Khan* v. *Mohammad Hassan*, [1901] I. L. R. 29 Cal. 167 (P. C.) at p. 186 : 29 I. A. 51).

An arbitrator may award one sum generally in respect of all money claims submitted to him, unless the submission requires him to award separately, on some one or more of them. (*Whiteworth* v. *Hulse*, [1866] L. R. 1 Ex. 251 : 35 L. J. Ex. 149).

The arbitrator can lawfully make an award of a sum admitted to be due and a lump sum in respect of the remaining claim. If the final award professes to be made of and concerning all the matters referred to him, it must be presumed that, in making it, the arbitrator has taken into consideration all the claims and counter-claims. (*Union of India* v. *Jai Narain Misra*, A. I. R. 1970 S. C. 753).

*Clause (c)*

**Court.**—This clause does not mean that a court has jurisdiction to receive an award only if the whole cause of action arose within the jurisdiction of the court. Under this clause, any court which will have jurisdiction to decide the question arising from the subject-matter of the reference, will be the proper court in which the award may be filed. To give the court jurisdiction, it is not necessary that the whole cause of action should arise there. The court has jurisdiction to determine the subject-matter of the disputes between the parties also when the parties reside within its jurisdiction or the land is within its jurisdiction. (*Curseljj* v. *Shivabai*, A. I. R. 1943 Bom. 32 ; 44 Bom. L. R. 859).

The expression *civil court* as used in the clause does not include Revenue Court. (*Bithal Das* v. *Shri Nath*, 1947 A. L. J. 594 ; A. I. R. 1949 All. 360). But this Act applies to revenue courts in U. P. (*Raghubir* v. *Haji*, 1952 A. L. J. (Rev.) 54 ; 1952 R. D. 89).

The Insolvency Court is a special court and not a Civil Court within the meaning of this clause. It has, therefore, no jurisdiction to make a reference of the disputes involved in an insolvency proceeding to arbitration. After the commencement of the insolvency proceeding, the person proceeded against has no right to agree to a reference to arbitration. (*Mangi Lal* v. *Devi Charan*, A. I. R. 1949 Nag. 110 ; 1948 N. L. J. 309).

There is a conflict of judicial opinion among the various High Courts upon the point whether the term "court" as defined in Section 2 (c) of the Indian Arbitration Act includes an appellate court. The Calcutta and Saurashtra High Courts have held that the word "court" does not include an appellate court. (*Abani Bhushan* v. *Hem Chandra*, 227 I. C. 168 ; A. I. R. 1947 Cal. 93 ; I.L.R. (1946) 2 Cal. 492 and *Kanti* v. *Thakar*, 2 Sau. L. R. 44) and consequently it is not competent for an appellate court to refer to arbitration matters in dispute between the parties.

According to the Madras High Court, the expression "court" includes appellate court also. (*Subramanyam Bhartu* v. *Dewdass Nayar*, A. I. R. 1955 Mad. 693).

According to Patna High Court, "court" in Section 2 (c) includes an appellate court. (*Thakur Prasad* v. *Baleshwar*, A. I. R. 1954 Pat. 106) ; *Mora Dhawaj* v. *Bhudar Lal*, A. I. R. 1955 All. 353 (FB) ; 1955 A. L. J. 96). It may be noted that this Full Bench case of the Allahabad High Court has reversed the cases of *Sukrullah* v. *Rahman* and *Munni Lal* v. *Kishan*.

There is a divergence of judicial opinion in the Allahabad High Court on the point. In *Shukurullah* v. *Mt. Rahman Bibi*, A. I. R. 1947 All. 304; I. L. R. (1947) All. 227, it was held that an appellate court had no power to make reference to arbitration in respect of the subject-matter of an appeal pending before it. It was held that under section 21 of the Arbitration Act, it is only the parties to the suit who are competent to apply for a reference to arbitration and that parties to an appeal are not so authorised.

In a later Allahabad case *Munni Lal* v. *Kishan Prasad*, A. I. R. 1948 All. 443 ; I. L. R. (1949) All. 629, a contrary view was taken. It was held in this case that the word "court" includes appellate court. It was held that it was not necessary to give a restricted meaning to the word "suit" in section 21 and the term will not exclude execution proceedings or appeals or other proceedings before a Civil Court which are in the nature of suits in which civil courts decide disputes between the parties of a civil nature.

In the recent case of the same High Court *Lakshmi Narain* v. *Ram Babu*, A. I. R. 1953 All. 9, the view expressed in A. I. R. 1948 All. 443 was followed.

The definition of "court" in this clause makes it clear that all proceedings under the Arbitration Act will have to be taken to the Court which has jurisdiction to decide the question which forms the subject-matter of reference. (*Narain Das* v. *Cooperative Society*, A. I. R. 1953 Punj. 49).

*Clause (d)*

**Legal representative.**—The definition of "legal representative" in this clause has been taken verbatim from the definition given in section 2 (11) of the Code of Civil Procedure.

The following are the persons who are legal representatives :

1. A person representing the estate of a deceased person ;

2. A person who intermeddles with the estate of the deceased ;

3. A person on whom the estate of a deceased person devolves on the death of the party acting in a representative capacity.

**Person representing the estate of a deceased person.**—In the case of deceased persons who are solely governed by the Indian Succession Act and in other cases where probate or Letters of Administration have been obtained as regards the estate of the deceased, the executor or administrator, as the case may be, of a deceased person is his legal representative (Section 211 of the Indian Succession Act).

**Person intermeddling with the estate of the deceased.**—It is one of the essential tests with regard to the case of persons who intermeddle with the estate of another before they can be called as legal representatives of the deceased persons that they must retain possession of property belonging to the estate with the intention of representing the estate. (*Nagendra* v. *Haran*, A.I.R. 1933 Cal. 865 ; 149 I. C. 927). A Hindu widow taking an interest in her husband's estate which devolved upon her under the Hindu Women's Rights to Property Act, would be his legal representative. (*Venkatasubba* v. *Jagannadha*, A. I. R. 1946 Mad. 283 ; (1946) 1 M. L. J. 159).

The expression "legal representative" must be interpreted in the widest sense to include a reversioner whose right will be affected or might be affected if he survives the widow unless he is allowed to continue the suit or appeal. (*Gulzari Lal* v. *Sarju Bai*, 1949 A. L. J. 191 ; A. I. R. 1949 All. 604). So the expression includes a Hindu reversioner (on the death of a Hindu widow) who does not claim under the limited owner but under the last male absolute owner. (*Kailash* v. *Sheo Ranjan*, A. I. R. 1952 Pat. 380).

The term "intermeddle" has been used to mean as intermeddling with the assets of the deceased person in such a way as to denote an assumption of authority or an interest to exercise the function of an executor or administrator (*Halsbury's* Laws of England, Vol. XIV, p. 147-48).

A person who intermeddles with the estate may be treated as legal representative but this does not mean that a person intermeddling with the estate of a deceased should be preferred to a person who is found to be true legal representative of the deceased. (*Suraj* v. *Lakhor Kuar*, A. I. R. 1939 Pat. 117).

The following persons are legal representatives :

(a) Executors and administrators properly appointed ;

(b) Person who has taken on himself duties and responsibilities which belong to the office of executor or administrator even though only in respect of a part of the estate ;

(c) Heirs-at-law, whether they take by succession or by survivorship ;

(d) Reversioners when the action has been brought by or against the widow representing her husband's estate ;

(e) Universal legatee ;

The following persons are not legal representatives :—

(a) Creditors who have received payments of the debts due for the estate of the deceased ;

(b) Persons dealing in the ordinary course of business with goods of the deceased received from another ;

(c) Persons who merely intervene for the purpose of preserving the goods of the deceased or providing for his funeral or for immediate necessaries of his family ;

(d) Legatee of a part of the estate ;

(e) Persons taking possession of the property of the deceased from the legatee of a part of the estate. (*Natesa* v. *Allamlu*, A. I. R. 1950 Mad. 541 ; 1950 M. W. N. 311 ; (1950) 1 M. L. J. 476).

(f) Persons who claim adversely to the rightful deceased pawnor. (*Satya Ranjan* v. *Sarat*, A. I. R. 1925 Cal, 825).

*Clause (e)*

**Reference.**—A reference is made by a particular arbitrator being appointed under the agreement to refer.

The suit in appeal was brought by the plaintiff-respondent against the appellants M, B and R who were brothers. The suit was decreed and the defendants appealed to the High Court. R was a minor and although his brother M was his certificated guardian but the latter having refused to act as the guardian the appeal on behalf of R was filed under the guardianship of one Mst. Indrani. When the matter came up for hearing before the High Court, an application was filed saying that the parties had agreed to refer the dispute to arbitration. At that time R had attained majority and had engaged a counsel. The application for reference was signed by B and by another counsel who signed as Advocate for the appellants and who was only engaged to plead and had no authority to act on behalf of the appellants. In due course the arbitrators filed their award. R objected that he was not a party to the reference. It was found that B had a general power of attorney in his favour executed by M for self and as the certificated guardian of R. It was contended that the authority of B must be deemed to have ceased after R had attained majority as no fresh power of attorney was executed by R in his favour. It was *held* under the circumstances by the Allahabad High Court that B had authority to sign the application and to agree to refer the case to arbitration on behalf of all the appellants and furthermore the oral consent of the counsel bound the appellants. The mere fact that R did not sign the application for a reference was not enough to invalidate the reference. (*Madho Prosad* v. *Kanhaiya Lal*, 1945 A. L. J. 362).

On 3rd April, 1952, the company entered into an agreement with the Society (herein called the first agreement) whereunder the latter made a provision for repayment of moneys advanced to it by the company and agreed also to be responsible to the company for the repayment to the latter of such of the outstanding loans made by the company to the individual cultivators as the Society was able to verify. Thereafter on the 30th December, 1952, the Company entered into another agreement with the Society (herein called the second agreement) in the form prescribed by the Rules made under the Sugar Factories (Control) Act for the supply of cane to the company for the season 1952-53. The price of the cane supplied under this agreement was Rs. 15,92,000, and this amount the Company has paid to the Society after deducting therefrom the sum of Rs. 2,39,666-6-3 which it claimed to be due to it by the Society under the first agreement, and on the 11th October, 1953 it obtained from the Society a receipt in full and final settlement of the price

of cane and commission payable to the Society in respect of the cane supplied during the 1952-53 season. In the following month, however, the Society demanded from the Company payment of the balance of the price of the cane supplied, namely, Rs. 2,39,666-6-3 and upon the Company declining to pay, the Society on the 30th December, 1953, purporting to act under clause (10) of the second agreement, referred the matter to the Cane Commissioner for arbitration. The Company contended that the Cane Commissioner had no jurisdiction to entertain the claim made by the Society.

Clause (10) of the second agreement was in the following terms :

"Any dispute between the parties regarding the quality and condition of the cane, the place of delivery, the instalments and other matters pertaining to this agreement, shall be referred to arbitration in the manner provided for in the Rules. No suit shall lie in a civil or revenue court in respect of any such dispute."

Rule 23 (1) of the Rules made under the U. P. Sugar Factories (Control) Act, 1938, reads thus :

"Any dispute touching an agreement referred to in section 18 (2) or section 19 (2) of the Act shall be referred to the Cane Commissioner for decision or, if he so directs, to arbitration. No suit shall lie in a Civil or revenue court in respect of any such dispute."

The Allahabad High Court held that there was no dispute touching the second agreement which could be referred to the Cane Commissioner. There was no dispute as to the meaning of the agreement and there was no dispute as to the amount due to the society under that agreement. The Company paid the whole amount due for the price of sugarcane supplied and the commission due to the Society after deducting a certain amount claimed to be due to it under the first agreement and the Society gave the Company a clear receipt in full and final satisfaction of its claim under the second agreement. The dispute that the society is now raising is that the amount deducted by the Company as due to it under the first agreement was not due to it and therefore the amount was not liable to be deducted. This was a dispute which did not arise under the second agreement but arose under the first agreement. The dispute could not, therefore, be referred to the Cane Commissioner. It is true that the dispute put before the Commissioner took the form of a dispute under the second agreement inasmuch as it was said by the Society that the amount due to it under the second agreement was not paid by the Company. But in such cases the substance of the dispute has to be seen and not its form. (*The*

*Cooperative Development and Marketing Union Ltd.* v. *The Ganesh Sugar Mills Ltd.*, 1956 A. L. J. 711).

**Distinction between arbitration agreement (an agreement to refer) and a reference.**—While arbitration agreement is only a contract to refer, reference is a delegation of authority to a named arbitrator and an agreement to be bound by the award. (*James Finlay* v. *Gurdayal*, A. I. R. 1924 Sind 91). Therefore an agreement to refer and a reference are only distinguishable as separate transactions. Where there is an agreement to refer in which no arbitrators are named and a reference is made to an arbitrator in pursuance of that agreement, the first is merely an agreement and the second is the reference in the strict sense of the term. (*Ramchand* v. *Gobind* A. I. R. 1920 Sind 124). Even in case of reference at the second stage, it will be valid and binding although no arbitrator has been named. (*Bawa Chatgirt* v. *Matnomal*, 4 I. C. 359). Under the Indian Arbitration Act, 1940, arbitration agreement and a reference have been separately defined by section 2 (a) and section 2 (e) respectively.

**Interpretation of reference.**—A reference to arbitration should be read not in any pedantic spirit but so as to interpret broadly the intention of the parties. (*Thimmalai* v. *Nanjayyar*, A. I. R. 1941 Mad. 266 ; (1940) M. W. N. 879).

**Unilateral reference.**—When it is desired to take advantage of an arbitration clause, it is necessary that the party seeking the reference should first call upon the other party to join in the submission. An one-sided reference is illegal until and unless the other party has refused to join the reference. (*Punjab Province* v. *Lakshmi Das*, A. I. R. 1944 Lah. 149 ; 46 P. L. R. 50).

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## CHAPTER II

## ARBITRATION WITHOUT INTERVENTION OF A COURT

**3. Provisions implied in arbitration agreement.**—An arbitration agreement, unless a different intention is expressed therein, shall be deemed to include the provisions set out in the First Schedule in so far as they are applicable to the reference.

### Comment

**Object of the Section.**—The object of section 3 is to introduce into all arbitration agreements a recognised set of rules in place of the provisions usually inserted in submissions to arbitration before the Act But the parties may exclude the provisions of the Schedule, if they so desire, by expressing a contrary intention. (*Russell*, 13th Edition, p. 68).

In matters of interpretation the court is to be guided by the intention of the parties, and by what law an arbitration contract is to be interpreted is also to be determined by the intention of the parties. (*Sparier* v. *La Clocha*, (1902) A. C. 446 and *Fazalally* v. *Khimji*, A. I. R. 1934 Bom. 476 ; 36 Bom. L. R. 1005). Unless otherwise expressly negatived by the arbitration agreement, the matters provided for in the First Schedule will be implied in the submission. Where the enactment requires anything to be done, it is not open to the parties to override the provisions of the enactment. (*Kamta Prasad* v. *Ram Dayal*, A. I. R. 1951 All. 711). An award of the arbitrators has to be made within the period fixed under the agreement unless the same is extended by the Court under section 28 of the Indian Arbitration Act. This is a statutory provision. Where a party seeks to set aside an award on the ground that it was delivered after the time fixed, it is not open to the other party to plead that the first party is estopped by conduct from challenging the award on that ground, as there can be no estoppel against the statute. (*ibid*).

This section provides for implied provisions in the arbitration agreement. The First Shedule to this Act gives the implied conditions of arbitration agreements.

**4. Agreement that arbitrators be appointed by third party.**—The parties to an arbitration agreement may

agree that any reference thereunder shall be to an arbitrator or arbitrators to be appointed by a person designated in the agreement either by name or as the holder for the time being of any office or appointment.

**Comment**

For meaning of *arbitration agreement*, see section 2 (a).

**Who may be appointed arbitrator.**—The parties may appoint whomsoever they please to arbitrate on their dispute. They may choose an arbitrator by lot or in any other way. If they choose an incompetent or unfit person, that is their own affair (*Halsbury's* Laws of England, 2nd Edition, Vol. 1, p. 644).

The parties may appoint a single arbitrator, or two or more arbitrators and an umpire, two or more arbitrators without umpire, (*Abdul Shakoor* v. *Mahammad Yusuf*, 19 A. L. J. 348 : 48 All. 456 ; 32 I. C. 426), or a number of persons, or even a foreign court. Where a reference is made to an association consisting of a large and fluctuating body of persons, who cannot sit as a tribunal, the association has power to appoint individuals to act as arbitrators, and the rules of the association will be binding on the parties. (*Ganges Manufacturing Co. Ltd.* v. *Indra Chand*, 33 Cal. 1169). In the above case, it was observed :

"Where a dispute is referred to the award of a body of persons who can sit as a tribunal, then the arbitrators are not entitled to delegate their power to individuals. But where a dispute is referred to an association consisting of a large and fluctuating body of persons, who cannot sit as a tribunal, it must be taken that the parties intend that that body will carry out the arbitration in the only way in which it is possible to do so, *viz.*, by individuals selected for that purpose".

A contract which provides that a dispute arising in relation thereto should be tried by a foreign court is considered a submission of any dispute arising between the parties to the arbitration of such foreign court. (*Fazalally* v. *Khimji*, A. I. R. 1934 Bom. 476 ; 36 Bom. L. R. 1005).

A mere agreement between two persons to be concluded by the decision of a third does not by itself constitute such third person an arbitrator. To give him that character, it should be intended that such person should determine the dispute in a *quasi*-judicial way. So where *technical expert* is authorised to settle dispute merely by use of his skill and judgment, he is not an arbitrator. (*Des Ram* v. *Secretary of State*, 165 I. C. 598 ; A. I. R. 1936 Sind 201).

Any person who is under any legal or natural disability by virtue of any statutory provision or by reason of public policy can be an arbitrator, for every person is at liberty to choose one whom he likes best for his judge, and he cannot afterwards object to the manifest deficiencies of that one whom he has himself selected. (*Hunting* v. *Ralling*, 8 Dowl, 879 ; Russell, p. 92).

Normally an impartial person must be selected. The person selected to be an arbitrator should have no interest directly or even remotely in the subject-matter of controversy or in the parties. "The object as to interest only applies to the case of a concealed interest. For if the arbitrators have an interest in the subject of reference well known to the parties before they sign the submission, as if they refer to an owner of lands a question respecting the mode and expense of making a drain which will benefit the arbitrator's own estate, the award is good notwithstanding his own interest." (*Russell*, p. 93).

Subsequent acquisition of interest in the subject-matter of the reference disqualifies an arbitrator from continuing with his work. (*Blanchard* v. *Sun Fire Office*, 6 T. L. R. 365 ; *Edinburg Magistrate* v. *Lownie*, (1903) 5 F. 71). "If an arbitrator, unknown to one of the parties, has a personal interest in the subject-matter of the award, it would be improper that he should act as arbitrator, as the fact of his having such an interest might influence his decision. But in this case, as his interest was so small and was apparently unknown even to himself, it is impossible to say that it could have influenced his award in any way. (*Cooperative Hindustan Bank* v. *Bhola Nath* 31 I. C. 597, 19 C. W. N. 165).

A necessary witness in a case is disqualified from acting as an arbitrator. (*Hogg* v. *Belfast Cor.* 53 I. L. T. 62.)

In *Madho Mal Kishore* v. *Firm Gurdial Radha Kishen*, 63 I. C. 1007, Sir Shadilal, C. J., observed :

"It is a well established rule of law that there should be the greatest good faith on the part of all the parties concerned in relation to the selection and appointment of the arbitrator and every disclosure which might in the least affect the minds of those, who are proposing to submit their dispute to the arbitrament of any individual, as regards his selection and fitness for the post, ought to be made, so that each party may have every opportunity of considering whether the reference to arbitration to the particular individual should or should not be made."

The known *relationship* of the arbitrator to one of the parties does not make the award invalid. (*Bykunt* v. *Peronath*, 22 W. R. 447). But undisclosed relationship of an arbitrator to one of the

parties will affect the validity of an award. (*Trustees of the Firm of Motharam Dowlatram* v. *Firm of Mayadas Dowlatram*, 78 I. C. 521 ; A. I. R. 1925 Sind 150).

In an arbitration clause in a Government construction contract, it was provided that the Chief Engineer was to act as the sole arbitrator, and that, if the Chief Engineer was unable or unwilling to act as a sole arbitrator, then he must appoint another person in his place as an arbitrator. The Chief Engineer had to perform two duties. Firstly it was his duty to act as an arbitrator himself and if he did not do so, he clearly refused and neglected to perform the duties of an arbitrator. His second function was that if he was unable or unwilling to act as a sole arbitrator, he had to appoint another person in his place as an arbitrator.

It was held that the second function of the Chief Engineer was the function performed by him not as an arbitrator but as a *persona designata* having certain duties to perform. Therefore the case became one contemplated by section 4. The Arbitration Act provides no machinery on the failure of the *persona designata* failing to act. The parties must, therefore, approach the court in these circumstances in the ordinary manner and either bring a suit for mandatory injunction or take such other steps in a civil suit as they may be advised but no appointment can be made by the court. (*Union of India* v. *New India Construction*, 57 P. L. R. 192 ; A. I. R. 1955 Punjab 172).

**5. Authority of appointed arbitrator or umpire irrevocable except by leave of Court.**—The authority of an appointed arbitrator or umpire shall not be revocable except with the leave of the Court, unless a contrary intention is expressed in the arbitration agreement.

**Comment**

**Scope of the section.**—Once an arbitrator is appointed, his authority can be revoked only—

(a) according to the provision to that effect in the arbitration agreement ; or

(b) if the agreement is silent, then according to the order of the Court. (*Prafulla* v. *Panchanan*, A. I. R. 1946 Cal. 427).

**Meaning of umpire.**—An umpire is a third person who is to decide a controversy or question submitted to arbitrators, in case of their disagreement. (*Blackstone* ; *Louis Dreyfus & Co.* v. *Hemandas*,

A. I. R. 1940 Sind, 37 ; *Yashovant Rao* v. *Dattatraya Rao*, (1947) Nag. 631). If there is disagreement between the arbitrators, there is no award and the jurisdiction of umpire is attracted. In the absence of a contrary provision in the arbitration agreement the upmire must adjudicate upon the whole case, even if the arbitrators disagree in one point. It is really for the umpire to decide if there is a compromise or withdrawal of the reference which cannot be retracted. Even if there is a compromise, the umpire may make an award according to the compromise. In fact the umpire ought to embody the admitted clause or compromise in the award unless the parties invite him not to do so. (*Probodh Kumar* v. *Union of India*, 56 C. W. N. 436).

**Revocation of authority.**—Once a valid submission has been made to an arbitrator, it is irrevocable without leave of the court under this section and if the arbitrator refuses or neglects to act, the procedure laid down by section 8 of this Act should be followed. So long as the arbitrator holds his mandate unrevoked, the parties cannot appoint a fresh arbitrator. (*Keshoram* v. *Peare Lal*, 21 A. L. J. 209 ; A. I. R. 1923 All. 223).

It was held that only under the Arbitration Act the Court can appoint a new arbitrator in place of a selected arbitrator. *Shiam Sundar Lal* v. *Bhairam Singh*, 3 A. L. J. 185 ; *Thorugan* v. *Chinna*, A. I. R. 1927 Mad. 910 and *Sadiq* v. *Nazir*, 33 All. 743 ; 38 I. A. 181 (P. C.)). But the court has inherent jurisdiction and it can, in the exercise of its inherent powers revoke a reference when it would be futile to proceed with the reference which is grossly irregular and defective. *Parrathamma* v. *Subbamma*, A. I. R. 1935 Mad. 349 ; *Anand Das* v. *Rambhusan*, A. I. R. 1933 Pat. 566 *Noraini* v. *Thirpal*, A. I. R. 1935 All. 281 and *Ahmed* v. *Cassum*, A. I. R. 1934 Bom. 388).

**Frustration of contract as a ground for revocation of authority.**—If the objects of a contract which contains an arbitration clause are completely frustrated by causes entirely beyond the control of the contracting parties to the arbitration, the clause comes to an end, and an arbitrator has no jurisdiction to deal with any question which may be raised, although neither party exercised a power of cancelling the contract under the clause contained in it. (*Hirji Mulji* v. *Cheong Yue Steamship Co.*, (1926) A. C. 495 ; 31 Com. Cas. 199).

**Granting of leave by Court to revoke being discretionary.**—The power of the court to grant leave is a discretionary power, to be exercised according to the circumstances of each particular case.

The discretion of the court ought to be exercised in the most sparing and cautious manner, least an agreement to refer from

which all might reasonably hope for a speedy end of the strife, should only open the flood-gates for multiplied expenses and interminable delays. (*Scott* v. *Van Sandam*, (1841) 1 Q. B. 102 ; *Kewal Ram* v. *Dewan Chand*, A. I. R. 1928 Sind 195).

The power to grant leave to revoke a submission is exercised by the court in a sparing and cautious manner and unless the applicant can establish that there will be failure of justice if the reference is allowed to proceed, he will not be allowed to revoke. (*Halsbury's Laws of England*, Vol. I, page 449).

When a party to a submission to arbitration feels aggrieved by the arbitrators deciding improperly or erroneously to admit evidence which they should have rejected, his proper course is to apply to the court for leave to revoke the submission. On such application the court will accord or refuse such leave according to the circumstances of each particular case that comes before it. The discretionary power should be exercised by the court in favour of the applicant if it appears to the court that the main object of all submissions to arbitration, which is to obtain speedy end of the strife, is not likely to be attained and the applicant is likely to be subjected to multiplied expenses and interminable delays by the conduct of the arbitrators, and leave to revoke should be accorded to the applicant in all cases where he can establish that there will be the failure of justice if the reference is allowed to proceed. (*Fire Insurance* v. *Ahmad Bhai*, 34 Bom. 1 ; 1 I. C. 14).

**Grounds for revocation.**—The House of Lords held that the court had power to give leave to revoke a submission where it appeared that the arbitrator was going wrong in point of law even in a matter within his jurisdiction. (*East and West India Docks Co.* v. *Kirk and Rendall*, (1887) 12 A. C. 738 ; 58 L. T. 158).

A party may be released from an arbitration clause if he can show that—

(a) the selected arbitrator is likely to show bias ; or

(b) there is sufficient reason to suspect that he will act unfairly ; or

(c) he has been guilty of continued unreasonable conduct ; or

(d) he has prejudged or formed an opinion about any matter likely to be referred to his arbitration. (*M/s Roshan Lal Sethi* v. *Chief Secretary*, A. I. R. 1971 J. & K. 91 ; *Fertilizer Corporation of India Ltd.* v. *M/s Domestic Engineering Installation*, A. I. R. 1970 All. 31).

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No hard and fast rule can be laid down as to the circumstances under which the court should exercise its discretion in granting leave to revoke the authority of the appointed arbitrator. But the discretion should be exercised within the following two limits :—

(i) The power should be exercised only when the court is satisfied that a substantial miscarriage of justice will take place in the event of its refusal to grant the leave. (*Bhawalka Bros* v. *Fateh Chand*, A. I. R. 1952 Cal. 294 ; 87 C. L. J. 71).

(ii) The court should not lightly release the parties from their bargain. (*ibid*).

In *Gaya Prasad* v. *Firm Muthu Lal Budha Lal*, A. I. R. 1925 All. 202 ; 78 I. C. 1050, the Allahabad High Court laid down the law on the subject as follows :

"In giving leave to revoke a submission, the court shall be satisfied that a substantial miscarriage of justice will take place in the event of its refusal. It would be contrary to justice to give leave to revoke a submission to a party, who as a consideration for a contract had agreed to submit any disputes whether of law or facts, which might arise, to arbitration, when he found the case going against him. The exercise of the power of giving leave to revoke is in general limited to cases where the arbitrators are exceeding their jurisdiction or refusing jurisdiction or failing to do all that their jurisdiction requires them to do. The principle underlying the exercise of the power to revoke is that the parties take the arbitrators for better or for worse, and that their decision is final as to law and fact ; unless a substantial miscarriage of justice may take place, leave ought not to be given. It is no miscarriage of justice for a party to be injured by bad law which he has agreed to be bound by."

In arbitration in pending suits also, the court is empowered to grant leave to revoke an arbitration in a fit and proper case.

Where a person is appointed an arbitrator as a representative of the members of an association, the fact that he subsequently lost the representative capacity will not result in taking away from him the authority of an arbitrator because the Arbitration Act makes no such provision. (*Jai Dayal Pearey Lal* v. *Chunilal*, 1950 A. L. J. 698 ; A. I. R. 1951 All. 359).

**Revocation by mutual consent.**—Mutual consent is one of the grounds for revoking arbitration. If a concluded compromise in undisputed terms is placed before the court by all the parties, whether before or after an award has been made the court may

grant leave under section 5 of the Arbitration Act. (*Prafulla* v. *Panchanan*, A. I. R. 1949 Cal. 427 ; 81 C. L. J. 1).

**Revocation on account of excess or refusal of jurisdiction by the arbitrator**—See above the case of *Gaya Prasad* v. *Muthu Lal*.

*Error of law* is also ground for revocation.

**Insolvency of a party.**—The insolvency of a party may be a ground for granting leave under section 5. (*Official Receiver* v. *Kersondas* A. I. R. 1926 Sind 209).

**Apprehension of bias as a ground for revocation.**—It is not necessary to show that the arbitration has, in fact, been biased. It would be enough to show that there is reasonable ground for apprehension that the arbitrator would be biased. (*Ram Sarup* v. *Khesardeo*, 89 C. L. J. 332). In India, as in England, the court will not refuse an application for leave to revoke the authority of an appointed arbitrator on the ground that a party knows or ought to have known that the arbitrator by reason of his relation towards any party to the agreement or his connection with the subject-matter referred might not be capable of impartiality. (*Bhuwalka Bros.* v. *Fateh Chand*, A. I. R. 1952 Cal. 294).

There is an inherent jurisdiction in the court to intervene and supersede arbitration where such an order is necessary for the ends of Justice or to prevent the abuse of the process of the court. (*Bhola Nath* v. *Raghunath*, A. I. R. 1929 All. 743).

It is not necessary to prove that the arbitrator designate will necessarily act unfairly, but all that is necessary is to prove that there is likelihood of a reasonable apprehension in the mind of one of the parties that the arbitrator may not act fairly. (*Ms. Roshan Lal Sethi* v. *Chief Secretary*, A. I. R. 1971 J & K 91). If the arbitrator has prejudged certain matters or his mind is made up on certain matters which are likely to come up for adjudication before him, this by itself is a sufficient disqualification for the arbitrator to act as such. (*ibid*).

**Misconduct of arbitrator as a ground for revocation.**—*Legal misconduct* is a term which is commonly used in reference to awards. It does not necessarily involve any moral turpitude or dishonesty on the part of the arbitrator. It is misconduct in the judicial sense of the word and has been described generally to mean an erroneous breach of duty on the part of the arbitrator, however honest, which causes miscarriage of justice. (*Aboobaker Latif* v. *Reception Committee, Indian National Congress*, 39 Bom. L. R. 476 ; A. I. R. 1937 Bom. 410).

In *Williams* v. *Wallis*, (1914) 2 K. B. 478; 110 L. T. 999, Atkin, J. observed : "With regard to the main question, I think, the Deputy Judge formed a misconception of the meaning of misconduct. It does not necessarily involve an imputation of personal turpitude in the arbitrator. It really does not mean much more than such a mishandling of the arbitration as is likely to cause some substantial miscarriage of justice,and one instance of this is where the arbitrator refuses to hear evidence upon a material issue. It is clear that the evidence tendered by the appellant was material, and if in fact the arbitrator did reject it, that, in my opinion, would be evidence of misconduct entitling the county Court Judge] to set aside the award."

The expression "misconduct" is of wide import and includes, on the one hand, bribery and corruption and, on the other, a mere mistake as to authority conferred by the submission. An arbitrator is not tied down to rigid or technical rules of evidence or procedure. But he must observe the first principles of justice and act in accordance with the principles of justice, equity and good conscience. (*Carter* v. *Oakley Duncan*, 12 Mys. L. J. 81 ; 39 Mys. H. C. R. 263).

To induce the court to permit a party to rescind his submission, strong grounds must have been laid before them. (*James* v. *Attwood*, 1 Scoll. 841).

Where there did not appear to have been any misconduct on the part of the parties or arbitrators, the court refused to direct a submission to be revoked. (*Woodcroft*, in re. 9 D. P. C. 538).

Unreasonable delay on the part of the arbitrator amounts to legal misconduct. (*Kishore Lal Ram Dayal* v. *Laxman Rao*, A. I. R. 1940 Nag. 386).

*Russell* states the following chief grounds for granting leave to revoke :—

(a) Error of law ;

(b) Excess or refusal of jurisdiction by arbitrator ;

(c) Misconduct of arbitrator ;

(d) Disqualification of arbitrator ;

(e) Exceptional cases.

**Application for leave to revoke.**—The proper procedure to be followed in moving for leave to revoke a submission under section 5 is by application in the Court.

In order to revoke the authority of an arbitrator, a notice of revocation should be given to him before the completion of the award. (*Nagaswamy Naik v. Rangaswamy Naik*, 8 M. H.C . R. 46). But if one party to a submission has been guilty of such laches as to entitle the other party to repudiate the submission, the latter will not be deprived of his right to repudiate merely owing to the absence of formal legal notice of revocation. (*Vishwas* v. *Bhalchand*, A. I. R. 1931 Bom. 529 ; 134 I. C. 733).

When an application for leave to revoke has been filed in the Court, the arbitrator should stay his hand and will be guilty of misconduct if he proceeds with the reference during the pendency of the application. (*Dhanpat* v. *Kishinlal*, 35 I. C. 536). The authority of the arbitrator cannot be revoked except with the leave of the Court. Where no such leave is granted the mere fact that the party has applied to the Court for revocation of the reference and also served a notice on the arbitrators that he does not want the matter to be decided by them, does not make the award of the arbitrators invalid. (*Ismail* v. *Hans Raj*, A. I. R. 1955 Raj. 153).

No party to an agreement to refer to arbitration can revoke the submission without just and sufficient cause for obtaining leave. The *burden of proving* revocation for good cause is upon the applicant and it is not for the opposite party to prove the negative, *i. e.*, the absence of good cause.

**Difference between an application under section 5 and that under section 34.**—The difference between an application under section 5 and one under section 34 of the Indian Arbitration Act is a difference as to the point of time when the application is made. If the proceedings are commenced in court, application for stay is made under section 34, and if the proceedings have not been commenced in court, the application is made under section 5. The object of both the sections is the same, namely, to prevent arbitration. There is, therefore, no reason why principles governing an application for stay should not be applied to an application under section 5. (*Bhuwalka Bros.* v. *Fateh Chand*, A. I. R. 1952 Cal. 294).

**Appeal.**—No appeal lies from an order granting leave to revoke passed leave under section 5 which is not an order superseding the arbitration. (Sec. 39 (1) ; *Bhaiyalal* v. *Sawani*, A. I. R. 1944 Nag. 152).

**Revision.**—Where no appeal lies, an application in revision can be made if good grounds are made out.

**6. Arbitration agreement not to be discharged by death of party thereto.**—(1) An arbitration agreement shall not

be discharged by the death of any party thereto, either as respects the deceased or any other party, but shall, in such event, be enforceable by or against the legal representative of the deceased,

(2) The authority of an arbitrator shall not be revoked by the death of any party by whom he was appointed.

(3) Nothing in this section shall affect the operation of any law by virtue of which any right of action is extinguished by the death of a person.

## Comment

**Scope of the section.**—Sub-section (1) provides that the death of any party to an arbitration agreement does not discharge the arbitration agreement, and on the death of any party the arbitration agreement can be enforced by or against the legal representative of the deceased party.

Sub-section (2) of this section provides that the death of any party to the arbitration agreement does not revoke the authority of the arbitrator.

According to sub-section (3), the provisions of sub-sections (1) and (2) of section 6 do not come into operation if any right of action is extinguished, by virtue of any law, by reason of death of a party to the arbitration agreement.

### *Sub-section (1)*

**Enforcement of arbitration agreement on death of a party.**—After the death of a party to the agreement, in all cases (other than those in which the right of action is extinguished by his death), the agreement is enforceable by or against his legal representative. This follows as a corollary to the rule that an arbitration agreement shall not be discharged by the death of any party thereto. Whether a legal representative of a deceased party is or is not bound by, or entitled to enforce, the contract to refer to arbitration, depends upon the nature of the right which forms the subject-matter of the reference, that is, upon the question whether the right is purely personal or survives to the legal representatives. (*Ramji Ram* v. *Salig Ram*, 14 C. L. J. 188 ; 11 I. C. 481). No option is left, after the enactment of this section, to the representatives of the deceased where the right survives. The representatives are not bound when the right is merely personal or, in other words,

where by operation of law the right of action is extinguished by death of a person (Section 6 (3) ).

**Legal representative.**—See Section 2(d).

**Bringing of legal representatives on record.**—If, before the hearing has been concluded, one of the parties dies, all his legal representatives must be brought on record and, if any one refrains to join as plaintiff, he should be joined as defendant. The leading Federal Court case on the subject is *Tirtha Lal* v. *Bhusan Dasi*, A. I. R. 1949 F. C. 195. The facts of this case are as follows :—

By a registered agreement, dated 15th August, 1938, three brothers K, T and N, members of a Dayabhaga joint family, appointed an arbitrator for partitioning the joint family property. The agreement provided that none of the parties or their representatives in succession could object to the arbitration. The arbitrator was authorised to make his award in instalments within 6 months but if more time was necessary to complete the work of partition, the arbitrator was entitled to extend the time by giving the three brothers intimation or notice. K died during the pendency of these proceedings leaving his surviving five sons and a widow. K's five sons expressed their willingness to abide by the reference and they were treated as parties to the proceedings. The existence of K's widow was ignored as neither the arbitrator nor the parties were aware of the fact that she was entitled to the same share as each of the five sons under the Hindu Women's Rights of Property Act, 1937. On 10th February, 1940, the arbitrator gave a notice to the parties, namely, the two brothers and five sons, of the extension of time for a further period of 6 months to complete the partition. A partial award was passed on 2nd October, 1940 after one more extension.

It was held that as the widow was not made a party to the arbitration proceedings and as no notice of extension of time to make the award was given to her, there was no valid extension of time to make the award and the defect was fatal to the award so far as she is concerned. K's estate was not properly represented by his five sons in the absence of the sixth co-sharer (the widow) and, therefore, the award passed in her absence and without notice to her was not binding on her. Mahajan, J., observed in this case :

"It is axiomatic that if a person is not a party to, or properly represented in any proceeding, he cannot be bound by those proceedings. The ordinary rule of law is that in case of death of a party, a valid award cannot be given which will bind the estate unless the legal representatives of the deceased are made parties to the reference. This can be done by giving notice to them where

the reference is not through court and where proceedings for substitution of the legal representatives is not necessary. As pointed out by Sri Ashutosh Mukherjee, J., in *Manindra Nath* v. *Mahananda Roy*, 13 I. C. 161 ; 15 C. L. J. 361, the submission to arbitration is not revoked by the death of one of the parties if the intention is that not merely the parties themselves should be bound by the decision of the arbitrator but also their representatives in interest, but if the hearing is not completed it will be necessary to bring the representatives of the deceased party on the record or to make them party to submission. If on the death of a party, his representative in interest proceeds with the arbitration and becomes a party to it, the award pronounced in the reference is binding on him. The principle that in a pending suit all parties must join in the reference also applies to arbitration out of Court. If one of the parties dies and his representatives do not join, the reference would be bad."

*Sub-section (3)*

**Examples when rights of action are extinguished.**—The following rights are extinguished on the death of a party :—

1. Right of pre-emption. (*Dayabhai* v. *Chuni Lal*, 38 Bom. 183 and *Kosela* v. *Gaya Prasad*, 28 All. 424).

2. Right for damages for defamation (*Khan* v. *Gulam Mohd.* 28 I. C. 455).

3. Right for malicious prosecution, (*Mahtab* v. *Hublal*, 48 All. 630 ; *Ram Kumar* v. *Jiwan*, A. I. R. 1941 Lah. 52 ; *Mani Ram* v. *Chathibai*, A. I. R. 1937 Nag. 216 ; *Palaniappa* v. *Raja of Ramnad*, A. I. R. 1926 Mad. 243 ; *Gopal* v. *Ram Chandra*, 96 Bom. 597).

4. Right of office, (*Sardar* v. *Gulzar Ali*, A. I. R. 1930 Lah. 703).

5. Suit for injunction. (*Jasium* v. *Venkata*, 5 I. C. 937).

6. Suit for breach of betrothal. (*Babu Bhai* v. *Nana Lal*, 44 Bom. 446).

7. Suit for wrongful arrest. (*Haridas* v. *Ram Das*, 13 Bom. 677).

8. Suit for malicious search. (*Gadgi* v. *Firm of Marwadi*, 38 I. C. 823), etc.

7. **Provisions in case of insolvency.**—(1) Where it is provided by a term in a contract to which an insolvent

is a party that any differences arising thereout or in connection therewith shall be referred to arbitration, the said term shall, if the receiver adopts the contract, be enforceable by or against him so far as it relates to any such differences.

(2) Where a person who has been adjudged an insolvent had, before the commencement of the insolvency proceedings, become a party to an arbitration agreement, and any matter to which the agreement applies is required to be determined in connection with, or for the purposes of, the insolvency proceedings, then, if the case is one to which sub-section (1) does not apply, any other party to the agreement or the receiver may apply to the Court having jurisdiction in the insolvency proceedings for an order directing that the matter in question shall be referred to arbitration in accordance with the agreement, and the Court may, if it is of opinion that, having regard to all the circumstances of the case, the matter ought to be determined by arbitration, make an order accordingly.

(3) In this section the expression "receiver" includes an Official Assignee.

## Comment

**Object of the section.**—The purpose of section 7 is to standardize the law as to the effect on an arbitration agreement and proceedings on insolvency of a party thereto.

**Applicability of the section.**—Section 7 does not apply to statutory arbitration. (Section 46 of the Arbitration Act).

### *Sub-section (1)*

**If the receiver adopts the contract.**—By sub-section (3) of this section, the expression "receiver" includes an Official Assignee. Where any part of the property of insolvent consists of unprofitable contracts, the Official Assignees may, by writing signed by him, at any time within twelve months after the insolvent has been adjudged insolvent, disclaim the property, Provided that, where such property has not come to the knowledge of the Official Assignee within one month after such adjudication

as aforesaid, he may disclaim the property at any time within twelve months after he has first become aware thereof. (Section 62 of the Presidency-towns Insolvency Act).

Section 64 of the Presidency-towns Insolvency Act, 1909 runs as follows :—

"The Official Assignee shall not be entitled to disclaim any property in pursuance of section 62 (of the Act, 1909) in any case where an application in writing has been made to the Official Assignee by any person interested in the property requiring him to decide whether he will disclaim, and the Official Assignee has, for a period of twenty-eight days after the receipt of the application, or such extended period as may be allowed by the court, declined or neglected to give notice that he disclaims the property ; and, in the case of a contract, if the Official Assignee after such application as aforesaid, does not within the said period or extended period, disclaim the contract, he shall be deemed to have adopted it."

There is no corresponding provision in the Provincial Insolvency Act and therefore the procedure directed in section 64 of the Presidency-towns Insolvency Act cannot be followed in cases governed by the Provincial Insolvency Act.

*Sub-section (2)*

**Scope.**—If the contract is one to which sub-section (1) of this section is not applicable, the procedure given in sub-section (2) should be followed. Before sub-section (2) can apply, the following conditions must be satisfied :—

(i) The contract of the ajudged insolvent containing an arbitration clause must have come into existence before the commencement of the insolvency proceeding.

(ii) The matter to which the agreement relates should be determined in connection with, or for the purpose of, the insolvency proceedings.

(iii) The case should not be covered by sub-section (1) of section 7.

(iv) An application should be made to the Insolvency Court by any party to the contract or by the receiver, for an order directing that the matter in question should be referred to arbitration according to the agreement.

(v) The Court should be satisfied that, having regard to all

the circumstances of the case, the matter ought to be determined by arbitration.

If the case is one to which sub-section (1) does not apply, in a case where the party interested has not served the Official Assignee with notice in writing under section 64 of the Presidency-towns Insolvency Act, in a case where the Official Assignee has not adopted the contract under the same section, or where there is no provision for adopting the same procedure, then if any matter to which the arbitration agreement applies require to be determined in connection with insolvency proceedings, any other person to the agreement or the Official Assignee or the Receiver may apply to the court of insolvency for the order directing that the matter in question shall be referred to arbitration in accordance with the agreement, and the Court may make such order in a fit case.

(8) **Power of Court to appoint arbitrator or umpire.**—(1) In any of the following cases—

(a) where an arbitration agreement provides that the reference shall be to one or more arbitrators to be appointed by consent of the parties, and all the parties do not, after differences have arisen, concur in the appointment or appointments ; or

(b) if any appointed arbitrator or umpire neglects or refuses to act, or is incapable of acting, or dies, and the arbitration agreement does not show that it was intended that the vacancy should not be supplied, and the parties or the arbitrators, as the case may be, do not supply the vacancy : or

(c) Where the parties or the arbitrators are required to appoint an umpire and do not appoint him;

Any party may serve the other parties or the arbitrators, as the case may be, with a written notice to concur in the appointment or appointments or in supplying the vacancy.

(2) If the appointment is not made within fifteen clear days after the service of the said notice, the Court may, on the application of the party who gave the

notice and after giving the other parties an opportunity of being heard, appoint an arbitrator or arbitrators or umpire, as the case may be, who shall have like power to act in the reference and to make an award as if he or they had been appointed by consent of all parties.

## Comment

**Scope of the Section.**—"Section 8 empowers the Court to appoint an arbitrator or an umpire in certain cases so that the arbitration agreement may not become abortive. It provides a machinery for effectively working out and enforcing the arbitration agreement. The umpire appointed under this section has the like power to act on the reference and to make an award as if he were appointed by consent of the parties. The scheme and object of the section shows that the application under this section can be made by persons by or against whom the arbitration agreement is mutually enforceable." (*Probodh* v. *Union of India*, A. I. R. 1953 Cal. 385 ; 56 C. W. N. 436). Where the parties will not appoint any arbitrator or any appointed arbitrator refuses to act or is incapable of acting or dies and there is no machinery in the submission whereby an appointment can be obtained then after following the procedure laid down in sub-section (2) the judge may appoint an arbitrator. (Wilson and Eastern Counties Navigation etc., *in re*, (1892) 1 Q. B. 81).

**Applicability of the section.**—Where in a pending suit the underlying object of the agreement was to entrust the determination of the matters in difference to a person of their own choice and not that if the named aribtrator was unable to act for one reason or another, the arrangement would automatically come to an end, section 8 read with section 25 of the Arbitration Act would apply to the case. (*Jawahar Lal* v. *Jagdish*, A. I. R. 1951 All. 335 ; 6 D. L. R. (All.) 146).

Section 8 does not apply when arbitrators have been named in the arbitration agreement. (*Sanday Patrick* v. *Shival Das*, 6 I. C. 857). But see *Bharat Construction* v. *Union of India*: A. I. R. 1954 Cal. 606.

Where a proposal to refer a dispute to arbitration and the nomination of an arbitrator are abandoned owing to an assurance by the opposite party, that the matter will be amicably settled, and a reference becomes necessary subsequently, then section 8 has no application to the case and a fresh nomination of an arbitrator may be made. (*Firm of Khalsa Bros*, v. *Hari Ram*, 83 I. C. 539 ; A. I. R. 1924 Sind 29).

*Sub-section (1)*

*Clause* (*a*).—In order to apply this clause, the following conditions must be satisfied :—

1. There must be a valid arbitration agreement ;

2. There should be a provision in the arbitration agreement for the appointment of one or more arbitrators ;

3. The arbitrator or arbitrators is or are to be appointed with the common consent of all the parties ;

4. The differences must have arisen between the parties to the agreement as regards subject-matter of arbitration ;

5. All the parties do not concur in the appointment or appointments ,

6. Notice must have been served by one party to another party or parties calling upon him or them to give his or their consent to the appointment ;

7. No consent has been given within 15 days after the service of the aforesaid notice ;

8. Opportunity must be given to the defaulting party or parties to say his say before the court.

If these above conditions are fulfilled, the court may appoint an arbitrator or arbitrators under clause (a) of sub-section (1).

4. **After differences have arisen.**—The powers of the court do not arise until differences have arisen and it is for the court to decide whether in fact differences have arisen or not. (*Russell*, 13th Ed., page 116 and 15th Ed., page 185).

5. **All the parties do not concur.**—This expression means all the parties to the arbitration agreemant and, after any party's death, legal representatives of the deceased party. A notice calling on the other party to name an arbitrator to act with one appointed by the party issuing the notice cannot possibly be construed as a notice to concur in appointing a single arbitrator under section 8 of the Arbitration Act, 1899. (*Sanday Patrick* v. *Shival Das*, 6 I. C. 857). The Arbitration Act does not limit in any way the number of arbitrators, nor does it prevent the parties, if they choose to do so as a matter of business by common consent, altering the number or the constitution of the tribunal so constituted. (*Abdul Shakur* v. *Mohammed*, 62 I. C. 426 ; 19 A. L. J. 348).

When one of the parties to the arbitration agreement refuses to concur in the appointment of the arbitrator under the arbitration clause, the other party has the option either to move the court under this section or under section 20. There is nothing in section 20 to compel the other party not to take recourse to this section 8. It is his concern whether to apply under this section or under section 20, and his application under this section cannot be rejected merely on the ground that section 20 is perhaps most appropriate. If a relief can be had under this section, it will be available to him. (*Balika* v. *Kedar Nath*, A. I. R, 1956 All. 377).

**Reference to a single arbitrator.**—Many arbitration clauses provide that any dispute which may arise may be referred to an arbitrator and contain no provision as to the number of arbitrators. Under these circumstances, para 1 of the First Schedule of this Act applies and it will be presumed that reference to a single arbitrator was contemplated by the parties. An intention to refer to more than one arbitrator must be plain and beyond doubt so as to abrogate the ordinary rule of reference to a single arbitrator.

*Caluse* (*b*).—The court may appoint an arbitrator or arbitrators or umpire, as the case may be, in the following cases :—

1. Any appointed arbitrator or umpire—

(i) neglects to act, or

(ii) refuses to act, or

(iii) is incapable of acting, or

(iv) dies ;

2. The arbitration agreement contemplates that the vacancy should be supplied or filled up ;

3. The parties or the arbitrators (as the case may be) do not supply the vacancy ;

4. Notice must have been served by one party to another party or parties ;

5. No appointment has been made within 15 days of the service of the notice ; and

6. Opportunity has been given to the defaulting party to say his say before the court.

**1. (i) and (ii) neglects or refuses to act.**—In explanation

appended to section 8 of this Act, the Legislature has indicated what would amount to neglect or refusal to act.

Where an umpire after completing the enquiries falls ill and returns the file but subsequently signs the award and submits it within the time fixed by the court for the delivery of the award, it was held that he has not refused or neglected to act. The mere fact that an arbitrator declines to sign the award which has been arrived at by the majority of the arbitrators, does not show that he has refused to act as arbitrator. (*Ghissa* v. *Bhawani Dass*, A. L. J. 683).

Where the arbitrator says that he would act no further till his fees are paid in advance, such action amounts to act on his part within the meaning of this section and a new arbitrator can be appointed in his place. (*Priyabrata* v. *Phani* A. I. R. 1937 Cal. 523).

A refusal on the part of an arbitrator to act can be implied from his conduct, *e.g.*, when he fails to submit the award within the fixed time. (*Narendra* v. *Brajeswari*, 23 I. C. 842 ; A. I. R. 1914 Cal. 448).

When the appointed arbitrator expresses his unwillingness to act and if the party concerned does not give notice under this section, it is not for the court to give any notice to him regarding supersession. (*Kasturi Lal* v. *Ram Chandra*, A. I. R. 1956 Raj. 129).

Under an arbitration clause, the Chief Engineer has been given the option of either entering upon the reference himself or of appointing another arbitrator. His silence does not mean that he has neglected or refused to act. When a notice is served upon him to enter upon the arbitration, he can choose one of the two courses. He can reply and say that he is going to enter upon the reference or he can say that he is going to appoint some one else as the sole arbitrator. Upon the decision being taken, the provision of sec. 8 (1) (b) comes into play but, until then, it cannot be said that he has rejected or refused to act. (*Union of India* v. *New India Construction*, A. I. R. 1955 Punjab 172).

1. (iii) **Incapable of acting.**—"It would appear that the word 'incapable' must refer to some incapability arising after the date of the appointment, or not known to the parties at that date. It is submitted that the court is not entitled to treat an arbitrator as incapable when the parties rightly or wrongly have considered him to be capable. The standard of capability must be the standard of the parties who selected the arbitrator, and having selected him, they must take him for better or worse." (Russell on Arbitration, P. 119, 13th Ed.)

Incapability can arise due to various reasons. An arbitrator's prolonged absence from the country, not knowing about his return (*Cada Dhar* v. *Ganga Prasad*, 4 B. L. R. 89) or arbitrator's transfer to an unknown address (*Governor-General-in-Council* v. *Associated Livestock*, A. I. R. 1948 Cal. 230) means that the arbitrator is incapable of acting.

The contingency of being incapable of acting will never arise in the case of an arbitrator who is appointed by office. (*Chief Engineer* v. *Harbans Singh*, A. I. R. 1953 Raj. 30 ; 1953 Raj L. W. 310).

**Written notice to concur in the appointment.**—In the absence of written notice the court has no jurisdiction to act under section 8. To proceed by the Court without notice amounts to material irregularity. (*Narayan* v. *Ram Lagan*, A. I. R. 1934 All ; *Durga* v. *Bharti*, A. I. R. 1933 Oudh 540 ; *Bharat Construction* v. *Union of India*, A. I. R. 1954 Cal. 606).

The notice should be served in the manner provided in section 42.

The party himself can sign and serve the notice and what the party can do himself, he may do by means of an agent. The notice duly signed by the attorney of a party is valid. (*Nalini Ranjan* v. *Union of India*, 92 C. L. J. 220 ; A. I. R. 1954 Cal. 462).

*Sub-section* (2)

**The court may appoint.**—Kay, L. J. said in *In re Eyer Corporation of Leister*, (1892) 1 Q. B. 136 :

"I desire, however, not to bind myself with regard to the question whether the word 'may' in the section may not in certain cases give a discretion to the court. I conceive that cases might arise where it would be necessary to exercise some discretion. I understand that in this case it is admitted that some of the matters in dispute were clearly such as came within and ought to be referred under the submission. In such a case, I do not think that the court would have a discretion to say that it would not entertain the application, assuming, of course, that all the necessary preliminary steps had been taken—that is to say, that there had been a sufficient notice within the section, and no appointment had been made within the prescribed days. In such a case I do not think the court ought to exercise any discretion if it has any ; its duty under such circumstances really becomes only ministerial. I, therefore, agree that for the purposes of this case, the word 'may' must be treated as equivalent to 'must'. But I do not wish to hold that in every case

'may' in this section is equivalent to 'must'." (See also *Gopalji* v. *Morarji*, A. I. R. 1919 Bom. 24 ; 50 I. C. 411 and *Thakar* v. *Ram*, 88 I. C. 975).

The power of the court to appoint an arbitrator only comes into existence when all the terms of the section are complied with (*Ram Lagan* v. *Phatangan Lohar*, A. I. R. 1928 All. 674 ; 1929 A. L. J. 31).

Under Section 8 (2), the Court is not competent to appoint an umpire in the absence of any notice on the arbitrators as required under section 8 (1) (C).

When the court is called upon to appoint an arbitrator it must appoint an impartial man. When arbitrators chosen by the parties are available, the court will, in the absence of special circumstances, compel the parties to abide by their contract. But where that is not the case, a very strong and special case must be made out for the appointment of an employee of a party as arbitrator. (*Nalini Ranjan* v. *Union of India*, A. I. R. 1954 Cal. 462).

**Opportunity of being heard.**—Before the court exercises its jurisdiction, it is essential that the opposite party should be served with a notice and be given an opportunity of being heard. (*Ganendra* v. *Harendra*, A. I. R. 1926 Cal. 730 ; *Jagannath* v. *Chedi*, A. I. R. 1929 All. 144 ; *Ram Rudh* v. *Nanak*, A. I. R. 1932 Oudh 151).

Where a case is referred to arbitration and the arbitrators returned the papers without submitting their award and the parties also expressed their unwillingness to arbitration, and the Court without expressly recording an order of supersession fixed a date for deciding the case and passed final orders, it was held that the procedure followed was irregular. (*Mangor Sahu* v. *Bhatoo Singh*, 57 I. C. 473). Opportunity should be given to the parties for being heard. (*Budh* v. *Nanak*, 129 I. C. 162).

**Application to the court.**—The application under this section can be made by persons by or against whom the arbitration agreement is mutually enforceable. Russell says, "only persons who are parties to the arbitration agreement concerned can make application to the Court for appointment by it".

**Failure to follow procedure under Section 8 (2).**—If the arbitrators do not nominate an umpire, then under Section 8 (1) (c) a party has to serve the arbitrators with a notice in writing and if within 15 days they do not make the appointment, then under Section 8 (2) the Court has the right to appoint an umpire. An umpire, however, is different from an arbitrator in this respect that

while the arbitrators have to sit together to make the award, the umpire is only called upon to act if the arbitrators have allowed the time to expire without making an award or have delivered to any party to the arbitration agreement or to the umpire a notice in writing stating that they cannot agree, the umpire then has to enter on the reference in lieu of the arbitrators and to make his award within two months (*see* paras 4 and 5 of the First Schedule), where, therefore, the arbitrators have agreed on all points, the umpire is not called upon to act at all. In the circumstances, it may be that the failure to appoint an umpire is not such a breach of the above provision as to vitiate an award and might amount merely to an irregularity which it is possible to waive. If on the failure of the arbitrators to appoint an umpire the parties do not follow the procedure laid down in Section 8 (2) of the Act but they appear before the arbitrators and produce all their evidence, they must be deemed to have waived the irregularity and are estopped from questioning the award subsequently on the ground of such irregularity. (*Shambhoo Nath* v. *Hari Shankar Lal*, 1954 A. L. J. 332).

**9. Power to party to appoint new arbitrator, or in certain cases, a sole arbitrator.**—where an arbitration agreement provides that a reference shall be to two arbitrators, one to be appointed by each party; then, unless a different intention is expressed in the agreement,—

(a) if either of the appointed arbitrators, neglects or refuses to act or is incapable of acting, or dies, the party who appointed him may appoint a new arbitrator in his place;

(b) if one party fails to appoint an arbitrator, either originally or by way of substitution as aforesaid, for fifteen clear days after the service bv the other party of a notice in writing to make the appointment, such other party having appointed his arbitrator before giving the notice, the party who has appointed an arbitrator may appoint that arbitrator to act as sole arbitrator in the reference and his award shall be binding on both parties as if he had been appointed by consent :

Provided that the Court may set aside any appointment as sole arbitrator made under clause (b) and either, on sufficient cause being shown, allow further

time to the defaulting party to appoint an arbitrator or pass such other order as it thinks fit.

Explanation.—The fact that an arbitrator or umpire, after a request by either party to enter on and proceed with the reference, does not within one month comply with the request may constitute a neglect or refusal to act within the meaning of section 8 and this section.

**Comment**

**Scope and applicability of the section.**—The following conditions must be fulfilled before a party can appoint a new arbitrator :—

1. There must exist a valid arbitration agreement ;

2. The agreement must provide that a reference shall be to two arbitrators ;

3. The said two arbitrators should be appointed one by each party ;

4. The arbitration agreement must not express an intention that the power to appoint a new arbitrator is not to be exercised ;

5. The party wishing to exercise the power must have appointed his arbitrator ; and

6. Such arbitrator must have refused to act or be incapable of acting or have died.

The following conditions must be fulfilled before a party may be allowed to appoint his arbitrator to act as a sole arbitrator :—

1. There must exist a valid arbitration agreement ;

2. The agreement must provide that the reference shall be to two arbitrators :

3. The said two arbitrators are to be appointed one by each party ;

4. The arbitration agreement must not express an intention that the power to appoint arbitrator as a sole arbitrator should not be exercised ;

5. The party wishing to exercise the power must have appointed his arbitrator before service of notice ;

6. There must be a failure on the part of the other party to appoint an arbitrator either originally or by way of substitution ;

7. Fifteen clear days must have elapsed after the service of the notice in writing (by the party desirous of appointing his arbitrator as the sole arbitrator) asking to make the appointment ; and

8. There must be failure on the part of the other party to make the required appointment.

But the court may set aside such appointment on showing sufficient cause and may allow the defaulting party further time to appoint an arbitrator or may pass such order as the Court thinks fit.

The procedure laid down by section 9 has no application to an arbitration agreement which provides for a reference to appointed arbitrators as distinguished from arbitrators to be appointed. (*Hariram* v. *Gobindram*, A. I. R. 1949 Sind 24).

This section does not apply where the reference is to three arbitrators, one to be appointed by each of the parties, and the third to be chosen by the two so appointed. (Smith and Nelson. *in re.* 25 Q. B. D, 545 ; 63 L. T. 475).

Where the arbitration clause provided that in case of dispute there was to be a reference to two arbitrators and that if the buyers failed to appoint an arbitrator the sellers would have power to appoint an arbitrator on behalf of the buyers but no such power was conferred on the buyers in the event of the sellers failing to appoint an arbitrator, it was held that the buyers in such an eventuality had their rights under section 9. The Court observed :—

"No such power was conferred on the buyers in the event of the sellers failing to appoint an arbitrator. It followed, therefore, that the buyers in such an eventuality had their rights under section 9, Arbitration Act. Assuming the conditions laid down in the arbitration clause had arisen and this fact is not admitted, to the buyers had a right to nominate the arbitrator whom they had appointed, to be the sole arbitrator in the reference."

Section 9 will come into play only if a different intention is not expressed. (*E. D. Sasoon* v. *Ram Dutt*, A. I. R. 1922 P. C. 874).

**Neglects and refuses to act.**—See under comment to section 8.

**Appointment is not complete till notified.**—The appointment of an arbitrator by a party is not considered complete until it has been notified to the other side and therefore it seems that the party who receives notice to appoint an arbitrator must not only make the appointment but also give notice of it to the other party within 15 clear days in order to avoid the appointment by the other party of his arbitrator to act as sole arbitrator in the reference. (*Russell*, 13 Ed., pages 129-30).

**Sole arbitrator.**—Where all the conditions laid down in clause (b) of section 9 are fulfilled, the party who has appointed an arbitrator may appoint that arbitrator to act as a sole arbitrator. (*Vallabhdas Meghji* v. *Cowasji Framji*, A. I. R. 1925 Bom. 409 ; 27 Bom. L. R. 568). Under clause (b), fifteen clear days are allowed to the other party to appoint his arbitrator, and in case of default the first party may appoint a sole arbitrator. (*Sukhmal* v. *Babulal*, 18 A. L. J. 652 ; 42 All. 525).

**Distinction between section 8 and section 9.**—Section 8 refers to the power of court to appoint arbitrator or umpire in cases of neglect, refusal to act, incapacity of acting and death of the appointed arbitrator or where the parties do not concur in the appointment of an arbitrator or arbitrators. But section 9 empowers a court to appoint his arbitrator as the sole arbitrator. (*Balmokand* v. *Uttamchand*, A. I. R. 1927 Sind 177 ; 100 I. C. 890). Section 9 does not refer to an arbitration agreement in which provision is made for a reference to appointed arbitrators, but it deals with an arbitration agreement in which provision is made for a reference to two arbitrators, one to be appointed by each party.

**10. Provisions as to appointment of three or more arbitrators.**—(1) Where an arbitration agreement provides that a reference shall be to three arbitrators, one to be appointed by each party and the third by two appointed arbitrators, the agreement shall have effect as if it provided for the appointment of an umpire, and not for the appointment of a third arbitrator, by the two arbitrators appointed by the parties.

(2) Where an arbitration agreement provides that a reference shall be to three arbitrators to be appointed otherwise than as mentioned in sub-section (1), the award of the majority shall, unless the arbitration agreement otherwise provides, prevail.

(3) Where an arbitration agreement provides for the

appointment of more arbitrators than three, the award of the majority, or if the arbitrators are equally divided in their opinions, the award of the umpire shall, unless the arbitration agreement otherwise provides, prevail.

## Comment

**Scope of the section.**—Section 10 makes provision for cases in which more than two arbitrators are appointed. The first two sub-sections of this section deal with the case of arbitration by three arbitrators, this being sub-divided in two classes, *viz.*, firstly, where the agreement provides for the arbitrator appointed by each party and the third by the two appointed arbitrators, and secondly, where more than two arbitrators are to be appointed in some different way.

**Sub-section (1).**—It provides for cases when a third arbitrator appointed by the two appointed arbitrators would be considered as an umpire. In *Smith* v. *Ludha Ghela*, 17 Bom. 129, the contract in dispute provided that disputes between the parties were to be referred to the arbitration of two merchants and that should the arbitrators be unable to agree, they should appoint an umpire. The plaintiffs and defendants referred their disputes to two arbitrators. These arbitrators disagreed in their report and referred the case to the Bombay Chamber of Commerce for the appointment of an umpire. The Chamber of Commerce appointed an umpire who made his award. Bailey, C. J., held that the appointment of the umpire was invalid and observed :

"The arbitrators were themselves to exercise the authority conferred upon them and could not delegate such power to anyone else. Consequently the appointment of an umpire in a manner totally different from that which the parties had agreed for, was, in my opinion, an invalid appointment."

Where there is a special method provided in the arbitration agreement as regards the appointment of an umpire, that method must be strictly followed. (*Bates* v. *Townley*, (1847) 1 Exch. 572). In the Act there is no mention of any particular method of appointing. It seems, therefore, that parol appointment is valid in absence of any provision in the arbitration agreement or in the statute under which the appointment is made.

In a case where arbitrators disagree on the matters referred to them and the necessity for umpire becomes established, it may well be that the omission of the arbitrators to appoint an umpire before they enter upon the submission will be fatal to the whole proceedings. But when no disagreement between the arbitrators occurs,

the omission to make the appointment of umpire is not a defect amounting to legal misconduct on the part of the arbitrator. (*Louis Dreyfus* v. *Hemandas*, A. I. R. 1940 Sind 37).

An appointment of an umpire by lot is bad. (*Re. Cassel*, (1829) 9 B. & C. 624). In this case, it was said : "The appointment of the third person must be the act of the will and judgment of the two, must be the matter of choice and not of chance unless the parties consent to or acquiesce in some other mode."

Where in an action for dissolution of partnership, the matters in difference were referred to arbitration, and two arbitrators were appointed, and the two arbitrators met at an hotel to appoint an umpire, and each man nominated a man unknown to the other and put the two names into a hat and directed the waiter to draw one out, and the lot fell upon Brown, the person nominated by the plaintiff's umpire, on motion on behalf of the defendant, it was held that the arbitrators not knowing whether the persons respectively nominated by each other were fit to act as umpire, the appointment was bad. An arbitrator entrusted with the duty of appointing an umpire has no right to evade his judicial duty by leaving the appointment to chance. (*Pescod* v. *Pescod*, 58 L. T. 76).

But an umpire may be appointed by lot if the parties to the reference assent to such a mode of election. (*Taylor* v. *Backhouse*, 20 L. J. Q. B. 233). But acquiescence in order to preclude a party from objecting to the mode of appointment, must be with full knowledge of all the relevant facts. (*Russell*, 13th Edition, p. 318).

**Time for appointment of an umpire.**—Under clause 2 of the first schedule, an umpire is to be appointed not later than one month from the last date of the arbitrators' appointments. Arbitrators having power to appoint an umpire may elect one before they enter upon the matter referred to them. (*Bates* v. *Cooke*, 9 B. & C. 407). The appointment of an umpire is not effective unless he accepts the office. (*Russell*, 13th Ed., p. 319). The appointment of an umpire by acceptance of the office exhausts the power of appointment and the appointers have no power to revoke the appointment (*Russell*, 13th Ed., p. 317).

**Stamp on written appointment of an umpire.**—The appointment of an umpire made in writing by two arbitrators requires no stamp. (*Russell*, 13th Ed., p. 314).

**Arbitrators sitting with umpire.**—Where arbitrators have power, if they should not agree, to appoint a third person to be umpire in, or to concur and join with them in, considering and determining all or any of the matters referred, such third person

when so appointed is not a third arbitrator but an umpire, and the effect of his appointment is that he is to sit with the arbitrators and hear and consider the matters referred and, if they do not agree in an award, to make an award apon all matters referred and not merely upon those in which they do not agree. (*Winteringham* v. *Robertson*, 27 L. J. Ex. 301).

The duties of an umpire are identical with those of an arbitrator.

*Sub-section* (*3*).—In case of odd number of arbitrators the award of the majority is to prevail. In case of even number of arbitrators, the abitrators are to appoint an umpire not later than one month from the latest date of their respective appointments. (*vide* para 2 of the First Schedule). In cases of vacancy, refusal, etc., the cases falling under this sub-section are governed by section 8.

The award by only 4 or 5 arbitrators is not invalid on that account when the parties have agreed to be bound by the award of the majority and other arbitrator has refused to act. (*Pitambar* v. *Chhabi Narain*, 1952 A. L. J. (Rev.) 178 ; 1952 R. D. 324 ; *Amar Nath* v. *Uggar Sen*, A. I. R. 1949 All. 399 ; *Raghubir* v. *Kuleswar*, A. I. R. 1945 Pat. 140). Where a dispute is referred to more than three arbitrators, the reference by sub-section (3) must be regarded as one expressly containing a proviso that the award of the majority shall prevail.

**11. Power to Court to remove arbitrators or umpire in certain circumstances.**—(1) The Court may, on the application of any party to a reference, remove an arbitrator or umpire who fails to use all reasonable despatch in entering on and proceeding with the reference and making an award.

(2) The Court may remove an arbitrator or umpire who has misconducted himself or the proceedings.

(3) Where an arbitrator or umpire is removed under this section, he shall not be entitled to receive any remuneration in respect of his services.

(4) For the purposes of this section the expression "proceeding with the reference" includes, in a case where reference to the umpire becomes necessary, giving notice of that fact to the parties and to the umpire.

## Comment

**Removal of arbitrator or umpire by court.**—The Court may remove an arbitrator or umpire in the following circumstances:-

(1) On the application of any party to a reference to remove an arbitrator or umpire who fails to use all reasonable dispatch in entering on and proceeding with the reference and making an award ;

(2) When the arbitrator or umpire has misconducted himself or the proceedings. (Section 11 (1) and (2) ).

Thus Section 11 empowers the court to remove a dilatory arbitrator or umpire or one who misconducts himself or the proceedings. It gives discretion to the court in the matter of removal of an arbitrator or umpire. Where the arbitrator fails to use all reasonable dispatch, the party has to make an application to the court without which it cannot have jurisdiction to remove the delinquent arbitrator. Where the arbitrator or umpire has misconducted himself or the proceedings,it is not necessary that an application should be made by the party to the reference in this behalf.

**Sub-section** (1).—In *Kesholal Ram Dayal* v. *Laxman Rao*, A. I. R. 1940 Nag. 386 ; (1940) N. L. J. 393, the court observed as follows :

"Unreasonable delay on the part of the arbitrator amounts to legal misconduct, as is laid down in *Coley* v. *Dacosta*, 17 Cal. 200 and *Bhogilal* v. *Chimanlal*, A. I. R. 1928 Bom. 49 ; 107 I. C. 707. In 17 Cal. 400, the delay was not for more than a year and there it was held that it was such a delay as entitled a party making the submission to the arbitration to revoke the reference and withdraw the proceedings from the arbitrator. In 107 I. C. 707, the delay was about five years but the length of the delay was not the criterion for the decision of the case. What is necessary in such a case of arbitration is that once an arbitrator is appointed, the parties to the arbitration are entitled to insist that the arbitration should be proceeded with reasonable speed and, if there be an unreasonable delay which is unexplained and not justified by the circumstances of the case, the parties to arbitration will be justified in revoking the reference and if an award is given after long delay they will be entitled to ask the court not to file the award."

But now the time is fixed by paras 3 and 5 of Schedule I of the Arbitration Act, 1940. Under para 3 of the First Schedule, the arbitrators are bound to make their award within 4 months from the date of reference or after having been called upon to act by notice

in writing from any party to the arbitration agreement or within such extended time as the court may allow. If they fail to do so, the court may remove them. So the period of four months is to begin only from the time—

(i) when the arbitrator enters on the reference, or

(ii) after having been called upon to act by notice in writing from any party to the arbitration agreement.

Para 5 of the First Schedule to the Arbitration Act, 1940 provides that the umpire shall make his award within two months of entering on the reference or within such extended time as the court may allow.

Dispatch means rapid performance. The arbitrator or umpire has to finish the work within the time prescribed above.

*Sub-section*(2)—**Misconduct.**—"It is difficult to give an exhaustive definition of what amounts to misconduct on the part of an arbitrator or an umpire. The expression is of wide import, including on the one hand bribery and corruption and on the other a mere mistake as to scope and authority conferred by the submission." (*Halsbury*, Vol. I, p. 478).

The word "misconduct", it would seem, may be construed in its widest sense and need not be confined to the kind of misconduct which was necessary to justify the setting aside of an award, *i. e.*, to some act contrary to natural justice.—(*Russell on Arbitration*, 13th Ed., p. 147).

In the case *In re Hall and Hinds*, (1841) 10 L. J. C. p. 210, Tindal, C. J., said :

"The mistake as a matter of carelessness is so gross as to amount, although not in a moral point of view yet in a judicial sense of that word, to misconduct on the part of the arbitrators."

In *Gunnis* v. *Amanmal Tulsidas*, 83 I. C. 353; A. I. R. 1923 Sind 75 (FB), the court observed as follows :—

"The question turns upon the meaning to be attached to misconduct. It has been suggested that the arbitrators behaved in any other way than has honourable gentlemen. But the term "misconduct" has in the legal sense a wider significance than personal behaviour. At page 387 of the *Russell's* Arbitration, 10th Edition, is the following passage: 'Legal misconduct is an ambiguous term, though commonly used. It would seem that it means misconduct in the judicial sense of the word, not from a moral point of

view, and means, for example, some honest though erroneous breach of duty causing miscarriage of justice."

The word "misconduct" does not necessarily comprehend or include misconduct of a fraudulent or improper character, but it does comprehend and include action on the part of the arbitrator which is, upon the face of it, opposed to all rational and reasonable principles that should govern the procedure of any person who is called upon to decide upon questions in difference and dispute referred to him by the parties. An arbitrator will be guilty of misconduct when he takes no evidence on the matter referred to him and has not allowed a party an opportunity of proving his contention. When objection is taken on that score to the proceedings of an arbitrator, the court must consider whether there really have been any proceedings before him upon which he could come to any decision either one way or the other. (*Deoki Nandan* v. *Raj Kumar*, 9 A. W. N. 124).

The term "misconduct" simply means legal misconduct. Legal misconduct is a term which is commonly used in reference to awards. It does not necessarily involve any moral turpitude or dishonesty on the part of the arbitrator. It is misconduct in the judicial sense of the word and has been generally described to mean an erroneous breach of duty on the part of the arbitrator, however honest, which causes miscarriage of justice. Misconduct is a question of fact in each case and has to be ascertained from the facts of the entire proceedings before the arbitrator. It really lies in the conduct of the arbitration proceedings and the onus of proof lies on the party who alleges it. The court never sits in appeal from the award of an arbitrator. Its function is to see whether the grounds of misconduct alleged by the party have been strictly found.

In *Williams* v. *Wallis & Cox*, (1914) 2 K. B. 478; 83 L. J. K. B. 1296; 110 L. T. 999, Lush, J., observed as follows:

"Misconduct is not necessarily personal misconduct. If an arbitrator for some reason which he thinks good declines to adjudicate upon the real issue before him, or rejects evidence which, if he had rightly appreciated it, would have been seen to be vital, that is misconduct in the hearing of the matter which he has to decide"

Atkin, J observed as follows :

"With regard to the main question, I think, the Deputy Judge formed a misconception of the meaning of misconduct. It does not necessarily involve an imputation of personal turpitude in the arbitrator. It really does not mean much more than such a mishandling

of the arbitration as is likely to cause some substantial miscarriage of justice, and one instance of this is where the arbitrator refuses to hear evidence upon a material issue."

The word "misconduct" as used with reference to arbitrations does not necessarily or at all imply anything in the nature of fraud. It certainly may include cases where the arbitrator has failed to perform the essential duties which are cast upon him as an arbitrator as he is occupying a quasi-judicial position. (*Bhogilal* v. *Chimanlal*, A. I. R. 1928 Bom. 49; 30 Bom. L. R. 92; 107 I. C. 707).

Misconduct on the part of the arbitrator must be misconduct in carrying out the terms of reference and within the scope of it. Anything beyond that is action without jurisdiction, whether or not it may amount to misconduct also. (*Ramswami* v. *Venkatarma*, 49 M. L. J. 523). But when parties have agreed to abide by the decision of a tribunal of their own selection unless there has been something radically wrong and vicious in the proceeding, it must not be set aside. Failure to observe the highly technical web of procedure and rules of evidence which surrounds judicial procedure does not amount to misconduct. (*Maung Shwe Hpu* v. *U. Min Nyum*, A. I. R. 1925 Rang. 383).

Does the *failure of arbitrators to examine the parties and their witnesses* amount to misconduct? In the Allahabad case *Lachmi Narain* v. *Sheonath Pande*, A. I. R. 1919 All. 98; 54 I. C. 433; 18 A. L. J. 78, Lindsay, J., said:

"It is argued here that the mere fact that the arbitrator decided the case of his own knowledge and without taking any evidence does not amount to misconduct. The matter has to be determined in the light of the language of the agreement by which the dispute was referred to arbitration. If the parties agreed that the arbitrator should decide the dispute between them on his own knowledge and further agreed that there was no need for him to take any evidence, no misconduct can be imputed. But there is nothing in the language of the agreement to suggest that it was the intention of the parties that the arbitrator should act solely upon his own knowledge of the facts. That he has done so is fatal to the award, in which he expressly says that he has decided the case upon the basis of his own knowledge."

In the case *Amir Begum* v. *Badruddin*, A. I. R. 1914 P. C. 105 ; 23 I. C. 625 ; 36 All. 336, Lord Parmoor, delivering the judgment of the Judicial Committee of the Privy Council, said :

"If irregularities in procedure can be proved which would amount to no proper hearing of the matters in dispute, there would

be misconduct without any imputation on the honesty or impartiality of the arbitrator."

The principle is that an arbitrator, though not bound by the technical web of judicial procedure and rules of evidence, must hear the parties and, if requested, their witnesses, unless he is absolved therefrom by the terms of the submission and must apply his mind to the points in dispute and decide it according to the ordinary rules of justice, equity and good conscience. The failure to hear the parties and, if necessary, their witnesses, unless absolved therefrom by the terms of the submission, amounts to misconduct on the part of the arbitrator within the meaning of sec. 11. (*Ma Hnine Le* v. *Ma Nyein Bwin*, 162 I. C. 772 ; A. I. R. 1936 Rang. 191).

The following are the cases of misconduct :—

1. If a material piece of evidence is tendered and rejected, it may amount to misconduct entitling the party to set aside the award. And a party is not precluded from impeaching an award on the ground of misconduct even if the arbitrator has been suggested by such a party. (*Aboobaker Latif* v. *Reception Committee*, A. I. R. 1937 Bom. 410).

2. Where the arbitrator has improperly refused to grant the necessary adjournments to the parties.

3. Where the arbitrator has refused to hear evidence within the socpe of the reference.

4. Where the arbitrator has examined a witness or a party in the absence of his opponent. (*Ganga Sahai* v. *Lekhraj*, 9 All. 253 ; *Sobha Ram* v. *Ram Das*, 66 P. R. 1907 ; 159 P. L. R. 1908 ; *Sundara Mudali* v. *Ponnusami Mudali*, 13 M. L. J. 275).

**Arbitrators, how far bound by rules of evidence.**—Section 1 of the Indian Evidence Act provides that the Indian Evidence Act does not apply to proceedings before an arbitrator.

Therefore the provisions of the Evidence Act do not apply to proeeedings before an arbitrator. The arbitrators are bound to conform to the rules of natural justice. They are unfettered by technical rules of evidence. (*Suppu* v. *Gavindcharyar* (1887) 11 Mad. 85).

In *Howard* v. *Wilson*, 4 Cal. 231, the question was whether an award is void in law on the ground that the arbitrator used in evidence a letter written by a party's attorney and stated to be without prejudice. The application to confirm the award was

refused by the learned Judge of the first instance, upon the ground that the defendant had acted improperly in using the letter. The Court of Appeal observed :

"Then as regards the letter itself, upon which the learned Judge in the court below has laid so much stress, it is perfectly true that it was a very improper thing for the defendant's attorneys to use a letter in evidence which was written *without prejudice*, and obviously in the course of negotiation between the attorneys on both sides for an amicable adjustment of the plaintiff's claim. Communications, such as these are clearly inadmissible in evidence. They are excluded on the ground of public policy and convenience, and the rule of law which excludes them is as binding upon the arbitrators as upon the Courts of Justice, notwithstanding section 1 of the Evidence Act. One is only surprised that a rule, so well-known amongst professional men, should have been transgressed, in this instance, by the defendant's attorneys...After all, the utmost that can be said is that the arbitrator made a mistake in receiving and using as evidence a document which, according to law, ought not to have been received. It is not suggested that he knew that he was doing wrong nor does it even appear that the plaintiff's advisers who were present, objected to the letter being received, upon the ground that it was written *without prejudice*. They objected on a different ground. Under these circumstances, we think that there was no sufficient reason to justify the learned judge in refusing to confirm the award. His decision will, therefore, be reversed, and our order will be that judgment be given in accordance with the award in the usual way." (See also *Das & Co.* v. *Broach Electric Supply Co.*, 30 Bom. L. R. 90 ; 108 I. C. 18 ; A. I. R. 1928 Bom. 55).

Therefore where the arbitrator allows to be given and acts upon evidence which is absolutely inadmissible and goes to the very root of the question before him, the award may be set aside, notwithstanding that the parties may have agreed that they should not be bound by the rules of evidence. (*Walford Baker* & *Co.* v. *Macfie* & *Sons*, (1915) 84 L. J. K. B. 2221 ; 113 L. T. 180). In this case Lush, J., observed :

"It may be that the rules of evidence which are acted on in these courts may not be strictly enforced in proceedings before a lay arbitrator. It is unnecessary to express an opinion whether that is so or not. But when it appears that an umpire allows to be given, and acts upon, evidence which is absolutely inadmissible, and which goes to the very root of the question before him, this court has ample jurisdiction to set aside the award on the ground of legal misconduct on the part of the umpire."

In *In re Keighley Masterad* & *Co.*, (1893) 1 Q. B. 405, Lord Esher, M. R., said :

"The parties have agreed to go to an umpire, who is not bound by the strict rules of evidence enforced in a court, and to be bound by his decision ; and in our judgment the court ought not to fetter the arbitrator or the parties by its own rules of evidence, but should consider whether something has been discovered since the award which the arbitrator might think material, and which alter his decision."

This rule is, of course, contrary to the decision laid down by Chief Baron Alexander in the case *Attorney-General* v. *Davison*, 4 Mode. & Y. 160 where he observed :

"But I have already understood that arbitrators are bound by the same rules of evidence as the courts of law."

The view expressed by Lord Esher in *In re Keighley Maxtead & Co.*, is scarcely in accord with the decision of the House of Lords in the case of *East & West India Dock* v. *Kirk and Randall*, 12 A. C. 738 ; 57 L. J. Q. B. 295.

But in India an award of the arbitrators cannot be set aside on the ground that they have not acted in strict compliance with the rules of evidence....(11 Mad. 85).

If in intending to decide rightly, an arbitrator comes to a wrong decision as to the competency of a witness, the admissibility of documentary or oral testimony, or the relevancy or the propriety of allowing proof of particular facts, it is now settled law that the court will not review his decision or set aside an award for the mistake. (*Hagar* v. *Baker*, 14 M. & W. 9). But an award must be set aside when an arbitrator refuses to hear evidence on a matter referred to arbitration. (*Samuel* v. *Cooper*, 2 A. & E. 752 ; *Pir Baksh* v. *Nihal*, 58 P. R. 1889 ; *Manindra* v. *Mahender*, 15 C. L. J. 360). An arbitrator ought not to hear or receive evidence from one side in the absence of the other. If he does so, he must give the other side an opportunity to meet his opponent's case. *Cursetji* v. *Crowder* 18 Bom. 299 ; *Bhaiya* v. *Jugeshwar*, 52 All. 938 ; 128 I. C. 4 ; *Delhi Cloth* v. *Kedari*, A. I. R. 1921 [Lah. 396 : *Ramaswami* v. *Subbier*, A. I. R. 1926] Mad. 1158 ; 97 I. C. 428 ; *Dital* v. *Dhanraj Mal*, A. I. R. 1925 Sind 287 ; 93 I. C. 840).

The taking of evidence of plaintiff in the absence of the defendant is misconduct on the part of the arbitrators even when they are empowered to dispose of the case without taking evidence. (*Venkatasubbaya* v. *Venkataramanaayya*, A. I. R. 1930 Mad. 646). It is the duty of the arbitrator in hearing evidence to act according to the terms of the agreement in pursuance of which the dispute is placed before him. (*Krishna* v. *Baidya*, 2 B. L. R. Ap. 25). It is

not misconduct to refuse to admit irrelevant evidence or to decline to summon witnesses in the exercise of his discretion. (*Rajendra* v. *Abdul Hakim*, 39, I. C. 767). An arbitrator is not of course bound by the technical and strict rules of evidenee. But he must not disregard the rules of evidence which are founded on fundamental principles of justice and public policy. (*Aboobakar* v. *Reception Committee*, 171 I. C. 470 ; 39 Bom. L. R. 476 ; A. I. R. 1937 Bom. 410).

An arbitrator who does not give any clear notice to the parties to produce their evidence before him and who does not take all the evidence that the parties want to produce, is clearly guilty of misconduct. (*Kanhaya* v. *Sheo Karan*, 39 P. L. R. 582). An arbitrator is guilty of misconduct when he examines no witness, even though the nature of the dispute is such that it could not be settled without evidence. (*Ram Chand* v. *Buta Ram*, 130 I. C. 833 ; A. I. R. 1931 Lah. 65). But the conduct of the proceedings depends upon the order of reference and if in an order of reference there is an implied agreement that further evidence is not to be put forward by the parties and that the parties have sufficiently and completely stated their case, the award cannot be invalid because the arbitrators did not give notice that they were prepared to receive evidence. (*Venkata Reddi* v. *Krishna Reddi*, A. I. R. 1927 Mad. 1010). If once it is proved that evidence has been improperly admitted, the question whether such evidence had or had not an effect on the arbitrator's mind is immaterial and the award cannot be supported. *Sanyasi* v. *Venkata* 73 I. C. 470 ; 44 M. L. J. 263 ; A. I. R. 1923 Mad. 301).

**Arbitration using personal knowledge.**—In a Madras case *Chidambaram Chettiar* v. *Ayyappa Chettiar*, A. I. R. 1935 Mad. 152 ; 155 I. C. 1095 ; 69 M. L. J. 558, the court observed.

"There is no doubt that if the arbitrators used knowledge or information derived from other sources than those, if they failed to communicate to the parties what they so knew and if the party making objection was prejudiced, the award would be invalidated. These principles must, of course, be applied with reasons."

It has been held by the Bombay High Court in *Daulat Singh* v. *Ratna Anand Singh*, A. I. R. 1926 Bom. 527 ; 97 I. C. 673 that where an arbitrator has been selected because of his personal knowledge of the matter in dispute, it will not be misconduct on his part to use his personal knowledge in coming to a certain decision, although in such cases it is desirable that he should tell the parties what is personal knowledge is and give an opportunity to them to adduce evidence sufficient to vary his views.

In *Muhammad Nawaz Khan* v. *Alam Khan*, 18 Cal. 414; 18 I. A. 73, the Privy Council referred to the fact that the arbitrator was selected by reason of his knowledge of the circumstances of the family, so that a decision based upon that knowledge would not amount to misconduct.

Where a submission recited that the arbitrators had been appointed on account of their skill and knowledge of the subject, and one of the parties brought before him a statement of certain facts which he alleged to be material, and offered to support it by proof, the House of Lords held that the arbitrator was justified in refusing to receive it, if taking all the matters alleged to be facts into consideration, with his own local knowledge to guide him, and all the circumstances in his view, he felt that such facts would have no effect upon his determination. (*Johnston* v. *Cheape*, (1817) 2 Dow. 247).

Similarly, there is a reference to the judgment of Lord Cranworth where certain surveyors were appointed to settle the amount of rent and other terms of a lease of a coal-mine, Lord Cranworth said:

"I do not agree in the suggestion that it was incumbent on the arbitrators to examine the witnesses. I do not think that is the meaning when a matter is referred to surveyors and people of skill to settle what the value of the property to be bought or let is. Necessarily they are entrusted, from their experience and their observation, to form a judgment which the parties referring to them agree, shall be satisfactory. Therefore, I do not think there was anything of importance in their not examining witnesses, provided *bona fide* they meant to say. "We know sufficient of the subject to decide properly without examining witnesses." (*Eads* v. *Williams*, (1854) 24 L. J. Ch. 531; see also *Ruttonsey* v. *Bombay United*, 37 I. C. 271 ; 41 Bom. 518).

In *Wright* v. *Howson*, (1888) 4 T. L. R. 386; an arbitrator experienced in cloth was held justified in deciding a dispute as to quality upon inspection of samples only. It was observed:

"Indeed every-day practice tells us that in many important commercial matters, such as in the sale of goods by sample, the whole benefit of referring a dispute to expert arbitrators would be almost nullified if it was essential for them to decide the case solely by witnesses called on the one side or the other as to the comparison between the goods tendered and the sample."

Whether the arbitrators can import their own personal knowledge into the consideration of the case before them will depend

upon the terms of the submission to arbitration. If the submission simply asks the arbitrators to decide a case, that does not give them a right to import their own personal knowledge into the consideration of the case. But where the submission to arbitration gives them an option either to take evidence or to decide the case upon their own personal knowledge they are entitled to import into the consideration of the case their own personal knowledge (*Palavesam Chettiar* v. *Narayana Aiyar*, 88 I. C. 660; A. I. R. 1925 Mad. 1086; 49 M. L. J. 115). Therefore, it is clear that an arbitrator is not entitled to examine witnesses in the absence of the parties or institute private enquiries behind their back, and an award based on such information or knowledge is invalid, unless a power is expressly vested in the arbitrator by agreement of the parties where they are *sui juris*. (*Ram Lal* v. *Mahadeo*, 89 I. C. 832; A. I. R. 1925 Oudh 741; *Venkatasubbiar* v. *Ramiah*, A. I. R. 1935 Mad. 184; 155 I. C. 381; *Ganesh Narain* v. *Malida*, 10 I. C. 450; 13 C. L. J. 399; *Tyebbhai* v. *Abdul*, 25 Bom. L. R. 392).

Where the question is one relating to the market rate on a particular date, *prima facie* it is not necessary for the arbitrators to hear oral evidence as the market rates are, as a rule, well within their knowledge and within the special experience for which arbitrators are selected. (*Bhican* v. *Tagor*, A. I. R. 1927 Cal. 227).

An arbitrator cannot import his own knowledge into a case or base his decision upon information obtained otherwise than from the evidence submitted to him by the parties, unless permitted to do so by the terms of reference. (*Abdul* v. *Bahram* A. I. R. 1935 Pesh. 69; 155 I. C. 1022).

**12. (1) Power of Court where arbitrator is removed or his authority revoked.**—Where the Court removes an umpire who has not entered on the reference or one or more arbitrators (not being all the arbitrators), the Court may, on the application of any party to the arbitration agreement, appoint persons to fill the vacancies.

(2) Where the authority of an arbitrator or arbitrators or an umpire is revoked by leave of the Court, or where the Court removes an umpire who has entered on the reference or a sole arbitrator or all the arbitrators, the Court may, on the application of any party to the arbitration agreement, either—

(a) appoint a person to act as sole arbitrator in

the place of the person or persons displaced, or

(b) order that the arbitration agreement shall cease to have effect with respect to the difference referred.

(3) A person appointed under this section as an arbitrator or umpire shall have the like power to act in the reference and to make an award as if he had been appointed in accordance with the arbitration agreement.

## Comment

**Scope and object of Section 12.**—Section 12 of the Indian Arbitration Act lays down the power of the court in case of removal of an arbitrator or in case of revocation of his authority. It makes provisions for the consequences of the removal of arbitrators while section 11 makes provisions for the removal of an arbitrator or umpire under the circumstances specified in section 11. Under none of the sections previous to section 12, any power has been given to the court to replace such an arbitrator or an umpire. This power is given by section 12.

### *Sub-section (1)*

**Scope.** According to this sub-section, where the court removes an umpire who has not entered on the reference or one or more arbitrators (not being all the arbitrators), the court is empowered on the application of any party to the arbitration agreement, to appoint persons to fill the vacancy.

**Removes.**—Under section 11, the court may remove an arbitrator or umpire who is either dilatory or has misconducted himself or the proceedings.

**Umpire who has not entered upon the reference.**—If the arbitrators have allowed their time to expire without making an award or have delivered to any party to the arbitration agreement or to the umpire a notice in writing stating that they cannot agree, the umpire shall forthwith enter on the reference in lieu of the arbitrators. (Para 4 of the first Schedule). An express admission of the arbitrators that they cannot agree is not necessary to give umpire jurisdiction to make an award. (*Hill* v. *Marshall*, 5 L.J.C.P. 161). If one of the arbitrators insists upon producing further evidence and the other refuses to allow it to be done, this is a sufficient disagreement between the arbitrators to authorise the interference of the umpire.

(*Cudliff* v. *Walters*, 2 M. & Rob. 232). It is sufficient to enable an umpire to make an award upon all the matters, that at the conclusion of the evidence the arbitrators arrive at different opinions in some of the matters referred; and he need not, if the time of making the award expired, wait to see if they ever agree. (*Winteringham* v. *Robertson*, 27 L. J. Ex. 301).

**Not being all the arbitrators.**—Sub-section (1) applies when one or more arbitrators are removed and not when all the arbitrators are removed. Where all the arbitrators are removed by the court under section 11, Sub-section (2) of section 12 will operate and the sole arbitrator has to be appointed. It is tantamount to revocation of the authority of the arbitrators.

*Sub-section (2)*

**Where the authority of an arbitrator, etc.....revoked by leave of the court.**—Section 5 of the Indian Arbitration Act enacts that the authority of an appointed arbitrator or umpire shall not be revocable except with the leave of the court, unless a contrary intention is expressed in the arbitration agreement.

After a reference to arbitration has been made in a suit through the court the parties cannot be allowed, by mere consent, to abandon the arbitration and go on with the suit or ask for a fresh reference. But if a concluded compromise in undisputed terms be placed before the court by all the parties, whether before an award has been made or after, the court may grant leave to revoke the submission under section 5 of the Arbitration Act and on superseding the arbitration agreement thereunder under section 12 (2)(*b*)pass a decree in terms of the compromise. (*Profulla* v. *Panchanan*, A. I. R. 1946 Cal. 427 ; 50 C. W N. 287).

Even when the authority of an appointed arbitrator is revoked with the leave of the court, the revocation has not the effect of cancelling an arbitration agreement. It is only when there is something in the arbitration agreement itself giving to the parties not only the right to revoke the authority of an appointed arbitrator in the event of his failure to make an award within the specified time but also the right to revoke the arbitration agreement for that reason, that the revocation of the authority of the arbitrator will make the arbitration agreement infructuous. (*Soney Lal* v. *Lallu Prasad*, A. I. R. 1955 Madh. Bh. 91, I. L. R. 1954 Madh. Bh. 31).

*Sub-section (3)*

**Effect.**—The effect of this sub-section is that an arbitrator or umpire substituted by court under sub-sections (1) and (2)

of section 12 to fill up the vacancy, will be entitled to exercise the same powers in proceeding with the reference and in making an award as if he had been appointed in accordance with the original arbitration agreement. By the enactment of this sub-section, any controversy as regards the powers of the newly substituted arbitrator or umpire has been set at rest.

**13. Powers of arbitrator.**—The arbitrators or umpire shall, unless a different intention is expressed in the agreement, have power to—

(a) administer oath to the parties and witnesses appearing ;

(b) state a special case for the opinion of the Court on any question of law involved, or state the award, wholly or in part, in the form of a special case of such question for the opinion of the Court;

(c) make the award conditional or in the alternative;

(d) correct in an award any clerical mistake or error arising from any accidental slip or omission;

(e) administer to any party to the arbitration such interrogatories as may, in the opinion of arbitrators or umpire, be necessary,

## Comment

**Scope of the section.**—Section 13 sets out the powers of arbitrators; it is based to some extent on section 10 of the Arbitration Act of 1899, and on paragraph 11 of the Second Schedule to the Code of Civil Procedure, 1908.

Section 13 sets out the powers of the arbitrators when there is no different intention expressed in the arbitration agreement, this section is applicable to statutory arbitration as well. In *Kursell* v. *Timber Operators and Contractors Ltd.* (1923) 2 K. B. 202 : 92 L. J. K. B. 607, Salter J. observed:

"The powers of such an arbitrator depend entirely on the con-

tract. Every power given to him by the Arbitration Act is subject to the agreement of the parties."

**Power to determine validity of contract.**—Primarily the arbitrator's jurisdiction depends always on the meaning and construction of the language of submission for an arbitration. Then, again, on a properly worded submission, an arbitrator can be made a judge not only of facts but also of law. But when the question itself is in issue in the sense that the controversy is whether the parties concerned at all entered into a valid agreement for arbitration, then that controversy cannot be decided by the arbitrators. That jurisdiction belongs to the Courts. But where the question is not one whether there was at all a submission to arbitration, but whether certain facts exist which make the contract or the submission void or unenforceable in law or statute, the arbitrator's jurisdiction is not thereby *ipso facto* ousted if it is otherwise within the scope of the submission. Thus where the validity of an arbitration clause depends on the vilidity of the contract containing it which in its turn, depends on deciding whether certain fact existed so as to make the provisions of the West Bengal Jute Goods Act, 1950 applicable to the contract, the arbitrator is competent to decide that issue of fact. (*Bhudar Mall* v. *Uma Shankr*, A. I. R. 1953 Cal. 613).

(i) *Clause (a)*

**Power of arbitrator to administer oath.**—The powers given to an arbitrator or umpire to administer oath to the parties or their witnesses are discretionary. He is not compelled to administer oath to any of them.—(*Russel* : On Arbitration, 13th Edition, page 132). But oath is to be administered if that is the condition of the submission unless it is waived by the complaining party by his conduct. It is no ground for setting aside an award that the arbitrator (a layman) has examined witnesses not upon oath or affirmation if that mode of proceeding was not objected to at the time of their examination. (*Biggs* v. *Hansell*, 16, C. B. 562).

It is not absolutely necessary that the evidence before an arbitrator should be taken on oath; the parties may waive it. (*Wakefield* v. *Llanelly* 34 Beav. 245). Witnesses in an arbitration may be examined by consent without being sworn if they are sworn before the award is made. (*Mansfield* v. *Partington*, 2. L. J. (O. S.) K. B. 153).

Where a cause was referred to arbitration by an order directing the witnesses to be sworn before a judge, and the arbitrator took the evidence of the plaintiff's witnesses not upon oath, which the defendant objected to, though he permitted his own

witnesses to be examined unsworn, it was held that by his proceeding the defendant had waived the objection and that he could not, on this ground, impeach the award. (*Allen* v. *Francis*, 9 Jur. 691).

The law is thus stated by *Rusell* :

"An arbitrator or umpire has power, unles the arbitration agreement expresses a contrary intention, to examine on oath; or affirmation the parties and witnesses appearing before him. He is not compelled to take the evidence on oath ; the matter is within his discretion, unless the mode of examination is expressly stipulated for in the arbitration agreement." (15th Ed. at p. 158).

**Power of court to issue processes for appearance before arbitrators**—*vide* section 43.

**Power to administer special oath.**—Conflicting opinions have been expressed by judges on the question whether the arbitrators are competent to administer special oath.

In *Wallullah* v. *Ghulam Ali*, 1 All. 536, the question arose whether the arbitrators were legally entitled to administer oath to a witness under section 8 of the Oaths Act and the evidence so taken could form the basis of an award. Pearson, J. of the Allahabad High Court held that the arbitrators were not legally competent to administer the oath. But Spankie, J. of the same Court took the contrary view and held that the arbitrators were authorised to administer an oath.

In *Muthukaruppa* v. *Veerabhadra*, 29 I. C. 49 : 17 M. L. T. 241, Sadasiva Aiyar J. said that there is nothing illegal in parties agreeing before *panchayatdars* to have evidence taken after the administration of any reasonable form of oath to witness.

But an arbitrator is not entitled to adopt the procedure of a social nature unless all parties affected by it agree to the adoption of such procedure. To do so, is to abrogate his function as an arbitrator and that would be a technical misconduct. (*Dital* v. *Dhanraj*, A. I. R. 1925 Sind 287). But where such irregularities have not been objected to by the non-consenting party, he cannot afterwards raise that objection because the doctrine of waiver applies to such a case. (*O' Neill* v. *Clark*, 57 Nehr. 760).

*Clause (b)*

**Power of arbitrator to state special case.—The power to state a special case is discretionary with the arbitrator.**

"Under the English law, the arbitrator can be compelled to refer a point of law for the opinion of the court, and on this there is authority that where the only matter in dispute is a question of law, the courts will be disposed to refuse to stay since it will be idle to remit to the arbitrator that which the arbitrator would, in his turn, have to remit to the court. But this argument does not apply in India because the Indian Arbitration Act contains no provision under which the arbitrators can be compelled to refer to the court a question of law. The machinery of the Indian Act is adequate for the disposal both of questions of fact and questions of law, and clause (b) gives the arbitrators power to invoke the assistance of the court for a decision of a question of law, if they so desire." (*Kodumal* v. *Volkart Bros.*, 48 I. C. 434 : 12 S. L. R. 34). It was held in this case that the arbitrators are competent to decide questions of law and fact, and the fact that a difficult point of law is involved is not ordinarily a good ground for refusing to stay.

The Calcutta High Court observed :

"Section 13 of the Indian Arbitration Act provides in clause (b) that the arbitrators have power to state a special case for the opinion of the Court on any question of law involved. Section 9 of the English Arbitration Act, 1934 empowers the Court to direct an arbitrator to state a question of law, but not under the Indian Arbitration Act. There are no powers in the Courts in India under the Indian Arbitration Act, 1940, to direct the arbitrator to state a special case." (*Haji Ebrahim* v. *Northern India Oil*, A. I. R. 1951 Cal. 230).

The arbitrators have power to state a special case for the opinion of the Court on any question of law involved in proceedings before them. A question of law can be submitted by an arbitrator to the court and be decided by it. Thus, where the jurisdiction of the arbitrator is in doubt or dispute, the arbitrator is fully competent and it is his duty to refer the matter to the Court. (*Baldey* v. *Kotagin*, A. I. R. 1950 Hyd. 63).

**Opinion of Court, whether binding upon arbitrators.**— In *Adamji Lakhmanji* v. *Messrs. Louis Dreyfus & Co.*, 79 I. C. 986 : A. I. R. 1925 Sind 83, it was held that the order of the Court on an application by arbitrators under clause (b) of the Arbitration Act is an opinion given by the court in merely consultative jurisdiction and is not a judgment or decision of the Court and cannot, therefore operate by way of *res judicata*.

In England the Court can compel an arbitrator to state a case but the courts in India have no such power. Clause (b) leaves it to the discretion of the arbitrators to state a special case or not as

they choose, and the Court has no power to enforce its rulings or directions upon the arbitrators if they do not choose to follow the rulings or obey the directions (*Gopaldas* in his *Law of Arbitration in India*). This distinction has an important bearing on the effect, so far as the arbitrators are concerned, of an opinion on any question of law obtained from the Court by Arbitrators. If they can legally be compelled to obtain that opinion, then it would seem that they are legally bound by the opinion when obtained ; if it is merely optional to them to seek such an opinion, it would appear that it has not necessarily a binding effect upon them. It cannot be said that the opinion of the Indian Court is final and binding on the arbitrators. (A. I. R. 1925 Sind 83).

**Award in the form of special case.**—An arbitrator or umpire may state in the form of a special case for the decision of the Court, either any question of law arising in the course of the reference or an award. It is not misconduct for an arbitrator or umpire to refuse to state the award wholly or in part, in the form of a special case on any question of law for the opinion of the Court. (*Russell*, 15th Ed. at p. 285).

A special case in an interim award, or upon a point of law arising in the course of a reference, may be stated, notwithstanding that proceedings under the reference, are still pending, while a case contained in a final award can only be stated after the proceedings are at an end. (*Russell*, 15th ed., P. 163).

An *appeal* is provided in the case of an award stated in the form of a special case. (*Section* 39 (1) (*ii*) ).

(9) *Clause (c)*

**Making of conditional award.**—An award may be conditional or in the alternative.

A dispute concerning the ownership of a diamond ring is referred to arbitration. The award may direct that the party in possession shall pay the other party Rs. 1,000 the said sum to be reduced to Rs. 5, if the ring is returned within fourteen days

The general rule is that an award ought to be certain so that no reasonable doubt can arise upon the face of it as the arbitrator's meaning or as to the nature and extent of the duties imposed by it on the parties.—*Russell*, 13th Ed., P. 207. But it is competent to an arbitrator, who is empowered to decide whether a sale should be set aside, to pass an award setting aside the sale on the vendor repaying the purchase-money. (*Venusami* v. *Chilakuri*, 15 I. C. 573; (1912) 1 M. W. N. 901). In this case the court observed:

"The matter in dispute before the arbitrator was whether the plaintiff was entitled to have a sale deed set aside. The arbitrator was of opinion that while the plaintiff was entitled to have it set aside, he was also bound as a matter of equity to repay the money that he has received in connection with the sale deed. It cannot be said that he acted beyond the limits of his jurisdiction in passing what in substance was a conditional award in plaintiff's "favour."

A conditional award may be open to objection that it is not final or definite, but a conditional award may be valid when a provision is made by it for an alternative in case the condition is not fulfilled.

**Making of alternative award.**—An award in the alternative may be sufficiently certain and final. If an award directs one of the two things to be done and one of them is uncertain or impossible, the award is nevertheless sufficiently certain and final if the second alternative is certain and possible, and it will be incumbent on the party to perform the second alternative. (*Simmons* v. *Swaine*, (1809) 1 Taunt. 549). Where a submission was with reference to a breach of contract by the non-delivery of certain goods, an award directing the delivery of the goods or, in default thereof, the payment of a sum of money was held to be a good award. (*Gabriel* v. *Langton*, 4 W. R. 249).

By two contracts, goods were sold under the conditions of the Association. Arbitrators appointed under these conditions found the sellers in default and made an award in favour of the buyers. On appeal, the appeal committee of the Association made a final award in favour of the buyers and, alternatively, at the request of the sellers, stated a special case on a question of law. They required that either party, if they wished to proceed with the special case, should within specified time, give the other party notice and set the award down for argument. Otherwise their award were to be final. The sellers moved to set aside the award on the grounds that the arbitrators had no jurisdiction to limit the time within which the sellers could proceed with the special case and thus cut down the seller's right, and that the award was conditional. It was held that the appeal committee had jurisdiction to make the alternative award in such a form and had allowed a reasonable time to make the opinion of the court. (*Olympia Oil and Coke Co.* v. *Mac Andrew*, (1918) 2 K. B. 771; 37 T. L. R. 581).

Alternative award made by the arbitrators in the form of a special case is valid. (*North Riding of Yorkshire County Council* v. *Middle Borough Council*, (1914) 2 K. B. 847; 83 L. J. K. B. 1001).

*Clause (d)*

**Clerical mistake or error arising from any accidental slip or omission.**—Upon the construction of these words, as a matter of grammar, *clerical* error belongs to 'mistake' only and 'error arising...omission, is a second and independent limb of the clause. A clerical mistake is something mechanical—a slip of the pen or something of that kind. The word "accidental" applies both to 'slip' and to 'omission'. Accidental slip occurs when something is wrongly put in by accident, and an 'accidental omission' occurs when something is left out by accident. (*Sutherland & Co.* v. *Hannebring Bros. Ltd.*, 90 L. J. K. B. 225; (1921) I K. B. 336).

*See* also comment under section 15 (c).

*Clause (e)*

**Interrogatories.**—This clause gives the power to the arbitrators or umpire to call upon either of the parties to answer such interrogatories as are deemed necessary.

**14. Award to be signed and filed.**—(1) When the arbitrators or umpire have made their award, they shall sign it and shall give notice in writing to the parties of the making and signing thereof and of the amount of fees and charges payable in respect of the arbitration and award.

(2) The arbitrators or umpire shall, at the request of any party to the arbitration agreement or any person claiming under such party or if so directed by the Court and upon payment of the fees and charges due in respect of the arbitration and award and of the costs and charges of filing the award, cause the award or a signed copy of it, together with any depositions and documents which may have been taken and proved before them to be filed in Court, and the Court shall thereupon give notice to the parties of the filing of the award.

(3) Where the arbitrators or umpire state a special case under Clause (b) of section 13, the Court, after giving notice to the parties and hearing them, shall pronounce its opinion thereon and such opnion shall be added to, and shall form part of the award.

## Comment

*Sub-section (1).*—The object of notice of making and signing of award is to apprise the parties to the arbitration agreement of the fact of the making of the award so as to enable them to prefer objection before the court in proper time. A mere omission on the part of some of the arbitrators to sign the notice required by the section is a mere irregularity and does not vitiate the proceeding. (*Ram Ratan* v. *Adhar*, 91 C. L. J. 267 ; A. I. R. 1953 Cal. 646).

*Sub-section (2).*—The mere filing of award in a court by a party to it is not enough within section 14(2) but where the award or a signed copy thereof is in fact filed into court by a party, he should have the authority of the arbitrator or umpire for doing so. It cannot be inferred from the mere handing over of the original award by the umpire to both the parties that he authorised them to file the same in the court on his behalf. That authority has to be specifically alleged and proved. (*Kumbha Mawji* v. *Union of India*, A. I. R. 1953 S. C. 313 ; (1953) S. C. R. 878 ; (1953) 1 M. L. J. 841).

Where the umpire sends the award to the court by post in compliance of its notice, it is sufficient compliance. (*ibid*).

Sub-section (2) of Section 14 lays down that the arbitrator or umpire shall file the award only—

(i) When any party to the arbitration agreement or any person claiming under such party requests the arbitrator or umpire to file the award ; or

(ii) When the Court directs the arbitrator or umpire to file the award ;

(iii) When the fees and charges due in respect of—

(1) the arbitration and award, and

(2) the costs and charges of filing the award,

have been paid.

The arbitrators are bound, at the request of any party or if so directed by the Court, to file an award or a copy thereof in the Court on payment of the fees and charges due in respect of the arbitration and award and of the costs and charges of filing the award, and such award, unless it is set aside or remitted for reconsideration, becomes enforceable as if it were a court decree.

Under sub-section (2) of section 14 the actual of the award by the umpire is not necessary but it is sufficient if the umpire causes the award to be filed.

It is not necessary that an application to file the award should be made by all the arbitrators. Any one of them on behalf of the others can file the award. (*R. K. Misra* v. *Kundan Lal*, I. L. R. (1949) Nag. 272 ; A. I. R. 1949 Nag. 349 ; 1949 N. L. J. 408). There is nothing in section 14 which precludes the arbitrators from filing the award. It is not correct to say that only the parties to the arbitration should make an application in Court for filing an award or causing an award to be filed. (*Narain* v. *Devaji*, A. I. R. 1945 Nag. 117 ; I. L. R. (1945) Nag. 323).

In case of transfer of a case to another Court after order of reference but before award, the award should be filed before the Court to which the case has been transferred. (*Harbhan Dutt* v. *Ladli Saran*, A. I. R. 1933 Oudh 547 ; 146 I. C. 582).

Where arbitrators make an application for filing an award at the request of one of the parties to the arbitration, the proper procedure is to allow the parties to the arbitration to take up the litigation in their hands and relieve the arbitrators. (*Narayan* v. *Devaji*, A. I. R. 1945 Nag. 117).

Where a Court finds that it has no pecuniary jurisdiction to entertain an application for filing an award, the proper order is one of return of the application for presentation to the proper court and not one of dismissal of the application. (*Vinayak* v. *Anant*, A. I. R. 1945 Nag. 214 ; 1945 N. L. J. 253).

The arbitrators are under a plain and simple duty to return the *documents* entrusted to them by the Court when their right to keep them comes to an end, whether by making of an award or by making of an award being impossible. (*Narasingh* v. *Nafar Chand*, 17 Cal. 832). They are equally under obligation to return the documents produced before them to the Court and not to the parties. (*Yusuf* v. *Riasat Ali*, A. I. R. 1926 Oudh 307 ; *Jay Mangal* v. *Mohan Rai*, 8 B. L. R. 319). If they fail to do so, it will not render the award invalid. (A. I. R. 1926 Oudh 307). Pencil or pen notes when there is a formal minute of the evidence and proceedings before the arbitrator are not required to be filed. (*Haji Ebrahim* v. *Northern Indian Oil*, A. I. R. 1951 Cal. 230 : 85 C. L. J. 176). The mere non-filing of *khatas* (account books) which were not received in evidence is not sufficient to vitiate the proceedings and render the filing of the award otherwise than in accordance with law. (*Ramtaran* v. *Adhar*, A. I. R. 1953 Cal. 646).

Where the parties to the proceedings for filing an award on any application under Section 14 do not raise a plea that the agreement to refer as well as the award and proceedings before the Court are collusive, the Court is not justified in raising such a plea *ous*

*motu*, which is one of fact, and in rejecting the application to file the award on that ground. (*Sobha* v. *Faqir*, A. I. R. 1947 Lah. 24 ; 225 I. C. 166).

**Notice of filing of award.**—The provisions of section 14(2) are mandatory and if notice of the filing of the award is not given to the parties, no decree can be passed by the Court on the basis of the award. (*Mairanjan* v. *Asaruddi*, 43 C. W. N. 924 ; *Muhammad Hussain* v. *Lallu*, 17 I. C. 430 : 15 Oudh Cases 294). Under this sub-section, the notice of filing is not to be given by the arbitrators or umpire but by the Court.

Where a defendant does not appear before the arbitrator to whom dispute has been referred to for arbitration and the arbitrator makes an award the Court cannot pass a decree on the basis of such award without issuing notice to the defendant, and the failure to issue such a notice is fatal to the decree.

The provisions of section 14 are mandatory and the parties are entitled to notice of the date of the filing of the award even if they had knowledge of the date on which the award was filed. The omission to give such notice is material irregularity and if a decree is passed upon the award without giving such notice, the decree is liable to be set aside, in revision. (*Gurditta Mal* v. *Basant Mal*, 89 I. C. 240 : A. I. R. 1952 Lah. 619 ; *Bholanath* v. *Batta Krishna*, A. I. R. 1927 Pat. 135 : 95 I. C. 321 ; *Saroj Bala Bose* v. *Jatindra Nath Bose*, A. I. R. 1927 Cal. 619 : 103 I. C. 625).

Where notice of the filing of the award was issued to all the parties except the party who had himself filed the petition in Court for a direction on the arbitrators to file their award and two other parties who had already appeared in Court and filed their objections, the award was held to have been filed in accordance with law. (*Ramratan* v. *Adharchandra*, A. I. R. 1953 Cal. 646).

The notice need not be in writing, formally delivered to the parties. It may be given orally if the parties are present in the Court personally or by authorised agent at the time of the filing of the award. (*Imam Din* v. *Allah Rakha*, A. I. R. 1942 Lah. 190 : 44 P. L. R. 249 : 20 I. C. 462). The Court's notice need not be in writing. (*Harichand* v. *Lachman*, A. I. R. 1948 E. P. 11 : 50 P. L. R. 57). The arbitrator has to give notice in writing of the fact that the award has been made and signed.

It is the statutory right of a party to be personally served with notice of the filing of the award, and the service except personal service is not a proper service. Knowledge of the filing of the award acquired otherwise than in the way prescribed by section 14

The *onus* lies upon the party desiring to proceed with the suit, to satisfy the Court that there was sufficient reason why the matter should not be referred in accordance with the agreement and the case was one in which the Court by reason of the fact that an order under this sub-section cannot be made, should be satisfied that there was sufficient reason why the matter should not be referred in accordance with the agreement and should, therefore, refuse to exercise its discretion to stay the suit. (*Daw Shwe Thit* v. *Ma Thani*, A. I. R. 1933 Rang. 331).

Where the defendant is called upon to show cause why the order of revoking the submission to arbitration should not be made, it is necessary for him to show what cause he had of revoking the submission to arbitration. He need not wait till completion of the award. (*Ghulam Mohd.* v. *Gopal Das*, A. I. R. 1933 Sind 68).

**Power of Court to appoint arbitrator.**—The jurisdiction of the Court to order a reference to arbitration is derived from the agreement of the parties, and an order of reference has to be made by the Court according to the provisions of the agreement (subject to any powers conferred on it by the statute), and at any rate, it should not be inconsistent with the intention of the parties disclosed by the agreement on a proper construction of its terms. (*Narayanappa* v. *Ram Chandra*, A. I. R. 1930 Mad. 28 ; 129 I. C. 638 ; 60 M. L. J. 676). The Court cannot change the original agreement between the parties to refer the dispute to certain number of arbitrators and order that in case of disagreement opinion of the majority of arbitrators should prevail. (*Ramayya* v. *Bappaya*, A. I. R. 1926 Mad. 1183).

A reference requires the assent of both sides. If one side is not prepared to submit a given matter to arbitration when there is an agreement between them that it should be referred, then recourse must be had to the Court under section 20 and the recalcitrant party can then be compelled to submit the matter under sub-section (4). In the absence of either, agreement by both sides about the terms of reference, or an order of the Court under section 20 (4) compelling a reference, the arbitrator is not vested with the necessary exclusive jurisdiction. (*Thawardas Pherumal* v. *Union of India*, A. I. R. 1955 S. C. 468 ; (1955) 2 S. C. R. 48 at page 58).

**Appeal.**—An appeal lies from an order filing or refusing to file an arbitration agreement under section 39 (1) (iv). No appeal lies from a decree passed on an award arrived at under section 20, except so far as it is at variance with the award. (*Lal Chand* v. *Megh Ram*, 160 I. C. 1075 ; A. I. R. 1936 Lah. 617).

**Court-fee.**—An application under this section is to be stamped with court-fees as provided by Article 1 of Schedule II of the Court-

Fees Act. In case of appeal, Article 2 of the same Schedule is applicable.

**Limitation.**—There was a contract between A and R about the supply of fuel by A to R for one year ending an 20-2-1952. It contained an arbitration clause for reference of a dispute arising under it to the arbitration of B. Some dispute arose between the parties about the quality of the fuel supplied and on 28-6-1951 R informed A that it had rescinded the contract. A protested against the decision but his protests were ignored and on 12-7-51 R informed him by telegram that the decision to rescind the contract was final. On 3-11-51 A asked R to refer the dispute between them to the arbitration of B according to the arbitration clause of the contract, but R refused to do so and communicated its refusal to him on 23-11-51. After remaining quiet for some time, A filed an application under section 20 of the Arbitration Act in the Court of Civil Judge on 3-8-54.

The cause of action for filing the application accrued to A earlier than 12-7-51. The period of limitation for the application, as provided in Article 181 of the Limitation Act, is 3 years from that earlier date. Therefore the application which was made more than three years from that earlier date was barred by time.

! It has been held by the Allahabad High Court that Article 181 of the Limitation Act, which is a residuary Article, applies to applications not only under the Code of Civil Procedure but also under the Arbitration Act, for which no provision is made elsewhere in the Third Division of the First Schedule of the Limitation Act. Therefore an application under section 20 of the Arbitration Act must be made within 3 years of the date on which the right to make it accrues.

Article 181 is contained in the third Division of First Schedule of the Limitation Act and provides for the limitation of 3 years to be computed from the date on which the right to apply accrues, for an application for which no period of imitation is prescribed elsewhere in the Schedule.

The next question arises as to when the right to make the application in the present case accrued to A. The parties had entered into an agreement of arbitration with respect to the subject-matter of the contract which was supply of fuel by one to the other during the period of one year ending on 20-2-52. A difference arose between them in respect of supply at the latest on 28-6-51 when R rescinded the contract, forfeited the security furnished by A and informed him that it would receive the supplies from elsewher in future. A became entitled to proceedings under section

20 of the Arbitration Act on receipt of this information from R. Therefore 28-6-51 is the date on which the cause of action accrued to him, what he did subsequently was simply to ask R to refer the dispute or difference that had already arisen, with the arbitration of B according to the arbitration agreement. What happened on 23-11-51 was only this that R refused to refer the dispute to arbitration. The dispute must have arisen before A suggested arbitration, otherwise there was nothing to be referred to arbitration.

It is not the law that no application can be made to a Court under section 20 unless the other party has refused to refer the dispute to arbitration as provided in Chapter II. A demand to refer the dispute to arbitration and the other party's refusal to do so are not ingredients of the cause of action for the right to apply to a Court that the agreement be filed and the applicant A cannot contend that the cause of action accrued to him only when the opposite party (R) refused to refer the dispute to arbitration. The opposit party's refusal is nothing more than a refusal to grant the relief asked for by the applicant. It will be self-contradiction to say that the cause of action accrues when the other party refuses to grant the relief for the cause of action (already accrued) (*Lala Amarnath* v. *The Union of India*, 1957, A. L. J. 18).

Therefore, the cause of action arose on 28-6-1951.

## CHAPTER IV

### Arbitration in Suits

**21. Parties to suit may apply for order of reference.**— Where in any suit all the parties interested agree that any matter in difference between them in the suit shall be referred to arbitration, they may, at any time, before judgment is pronounced apply in writing to the Court for an order of reference.

#### Comment

**Scope of the section.**—Chapter IV of the Arbitration Act is comprehensive and complete and covers all references to arbitration in pending suits, and Chapter II does not apply to such reference by its own force. (*Palaniyandi* v. *Kandappa*, A. I. R. 1951 Mad. 281).

In a pending suit, reference to arbitration may be made if the following conditions are fulfilled :—

1. The application should be made in writing to the Court for an order of reference.

2. All the parties interested in the suit must join in the application.

3. The application must be in respect of the matters in difference between those parties in the suit.

4. The application must be made before the pronouncement of the judgment in the suit by the Court.

5. There must be an agreement between those parties for reference of the matter in difference to arbitration.

Sections 21, 22 and 23 set out the initial steps to be taken for arbitration in a suit. (*Bhimraj* v. *Muniah*, A. I. R. 1935 Pat. 243). Section 21 is an enabling section and is not intended to be restrictive or exclusive.

**In any suit.**—The word "suit" has not been defined either in the Code of Civil Procedure or in the Arbitration Act of 1940. In the case *Watkins* v. *Fox*, 22 Cal. 943 at p. 948, Hill, J. observed :

"Numerous examples of litigious business might be mentioned to which it would, without an obvious misapplication of language, be improper to apply the word "suit" and I think that the term ought to be confined to such proceedings as under that description are directly dealt with by the Code of Civil Procedure, or such as by the operation of the particular Act which regulate them are treated as suits."

The word "suit" does not include an appeal. (*Bharasi* v. *Sarat*, 23 Cal. 415 ; *Jinahuddin* v. *Sarafaraz*, A. I. R. 1938 Pat. 80).

A proceeding for revocation of a probate is not a suit within the meaning of Order 23, rule 3 of the Civil Procedure Code and hence it is not competent to the parties to adjust the matter in difference by a compromise. (*Sarada* v. *Gobinda*, 6 I.C. 912 ; *Campbell* v. *Simpson*, 72 P. R. 1894). An execution proceeding is not a suit and therefore Section 21 does not entitle parties to an execution proceeding to file an application for a reference to arbitration. (*Bachan Lal* v. *Amar Singh*, A. I. R. 1935 All. 125 ; *Tirthsami* v. *Annappayya*, 18 Mad. 131 ; *T. Wang* v. *Sona Wangdi*, A. I. R. 1925 Cal. 812).

A suit is a process of recovery and of enforcing a substantive right of claim by the procedure laid down in the Code of Civil Procedure. (*Sewmal* v. *Mulomal*, 28 I. C. 68).

**All parties interested agree.**—For a binding award, the

parties must voluntarily refer to arbitration ; coercion of any sort by the Court will vitiate the reference. (*Kazee* v. *Hajoodeen*, 52 P. R. 1869 ; *Sheonath* v. *Ramnath*, 10 M. I. A. 413). The agreement to refer and the application to the Court founded on it must have the concurrence of all parties concerned. (*Daryao* v. *Ratan Lal*, 1944 A. W. R. (Rev.) 164 ; 1944 R. D. 325 ; *Ghafooran* v. *Abdul*, A. I. R. 1938 Oudh 154 ; 174 I. C. 766 ; *Patila* v. *Narasinga*, A. I. R. 1920 Mad. 852).

In order to find out whether the parties have interest in the subject-matter in difference, it is necessary to see the nature of the suit in which that question is raised and not the possibility of their having any interest in a future litigation which may arise as the result of the decree in the suit. (*Sheodahin* v. *Dasrath*, A. I. R. 1934 Pat. 19; 148 I. C. 512). It is not an invariable rule that every necessary party is necessarily an interested party in all matters of difference between those actively litigating. There may be cases where a person may be a necessary party and yet not an interested party in regard to any matter in difference between them. A man may be *ex parte* and yet interested within the meaning of sec. 21 (*Madan* v. *Nabi Baksh*, A. I. R. 1947 Lah. 177 ; 226 I. C. 241).

The words "parties interested" in this section are not confined to parties who are claiming something in their favour and do not cover a case where a party is pleading against his own interest. Although the action of a party to a suit should be detrimental to his own interest, he is nonetheless *interested* in the decision of the matter in difference arising between the parties to the suit. (*Ram Harak* v. *Mumtaz*, A. I. R. 1949 All. 679).

A person who has chosen to remain absent and allow *ex parte* proceedings to be taken against him is not necessarily a person not interested in the subject-matter of the suit. An important test is to consider whether he is a necessary party or such that if not originally impleaded the Court would direct him to be joined under Order 1, rule 10 of the Civil Procedure Code. (*Sharafat Ali* v. *Bhagwati*, A. I. R. 1929 All. 763 ; 1930 A. L. J. 239).

It is a question of fact in each particular case whether any particular person is interested in the specific dispute which is referred to arbitration or not and that question has to be decided from the whole circumstances of the case including his conduct upto the end of the proceedings, and the Court is not merely to be guided by the written statements. (*Mahadev* v. *Duttatraya*, A. I. R. 1928 Bom. 248 : 110 I. C. 343 ; 52 Bom. 408, *Jot Singh* v. *Hot Chand*, A. I. R. 1935 Sind 212).

If a person is *ex parte* in the suit he does not thereby cease to be a party interested in the reference. Hence, if such person has not joined the reference to arbitration made by the remaining parties, the reference to arbitration is invalid and the award will be wholly void. (*Ghafoor* v. *Abdul*, 174 I. C. 766 ; A. I R. 1938 Oudh 154 ; *Gulnur Bibi* v. *Abdul Samad*, A. I. R. 1931 Cal. 211 : 130 I. C. 209 ; 52 C. L. J. 208 ; *Karam Bibi* v. *Mohammad Alam*, A. I. R. 1929 Lah. 477 ; 119 I. C. 235 ; *Sarafat Ali* v. *Bhagwati*, A. I. R. 1929 All. 763 and *Deonarain* v. *Sugan Chand*, 1935 M. L. J. 89).

The expression "parties interested in the suit" in this section means parties interested in the specific dispute and not in the subject-matter of the whole suit. (*Raghunath* v. *Ram Rup*, A. I. R. 1924 Pat. 33). The expression should not be restricted only to those persons against whom relief is claimed. A person against whom no relief is claimed may be interested in the result of the suit, inasmuch as his liability to the plaintiff may ultimately arise by reason of any decision that may be given in the suit. (*Subba Rao* v. *Appadurai* 86 I. C. 839 ; (1925) M. W. N. 97 ; 48 M. L. J. 142; 21 L. W. 498 ; A. I. R. 1925 Mad. 621). Where parties have a common interest, it is not sufficient that certain persons should go and seek to refer the dispute pending between them and the other party to arbitration, without taking steps to consult the other person who had such common interest and to get their authority represent them on their behalf. (*Hashmat* v. *Siddiq*, A. I. R. 1927, All. 128). A party who is entitled to maintenance in a suit need not be joined. (*Sabta* v. *Dharam*, 35 All. 107).

**Objection of non-joinder and its effect.**—An objection to the validity of reference on the ground of non-joinder of all parties can be raised at any stage (*Venkata* v. *Venkataramaya*, A. I. R. 1930 Mad. 646 ; *Girja* v. *Kanhai*, A. I. R. 1918 Cal. 336 : 43 I. C. 169 ; *Taja* v. *Ghisu*, A. I. R. 1927 All. 563 : 25 A. L. J. 606 : 102 I. C. 236). Such objection can be raised even by those who are party to the reference, since it is a matter of jurisdiction and consent of the parties cannot confer jurisdiction. (*Duli Chand* v. *Manuji*, A. I. R. 1917 Cal. 481 and *Har Prasad* v. *Arabati*, A. I. R. 1924 Cal. 353). Non-contesting defendant can be estopped by his conduct from raising such an objection at any stage. (*Jag Rup* v. *Kashi*, A. I. R. 1934 All. 658).

Where a judge refers a case to arbitration without the consent of the parties interested, he exercises a jurisdiction not vested in him by law. (*Abdul Beg* v. *Nathu*, 1933 A. L. J. 602 ; A. I. R. 1933 All. 739 ; *Ram Harakh* v. *Mumtaz*, A. I. R. 1949 All. 679 ; *Parsuram* v. *Muthiswami*, A. I. R. 1925 Mad. 1209). A reference to which all persons interested do not join is without jurisdiction and invalid not

only against the absent party but against all parties, including those who have joined the reference and it need not even be set aside. (*Venkata* v. *Venkata*, A. I.R. 1930 Mad. 646 ; *Abdul Wahid* v. *Ram Bux*, A. I. R. 1939 All. 49 ; *Ahmad* v. *Sardar* A. I. R. 1929 Lah. 171 ; 114 I. C. 712). But in *Mamraj* v. *Mst. Kishni*, A. I. R. 1951 Simla 183 and *Gure Murti Rani* v. *Narsingh*, A.I. R. 1954 Orissa 230, it has been held that the party to the reference cannot object and the award is binding on the party to the reference.

In cases in which the interest of the defendant may be severed, there is no bar to some of the contesting defendants joining with the plaintiffs in referring the matter in difference between them to arbitration. (*Bankey* v. *Chhotey*, A. I. R. 1931 All. 453). In cases where the defendants were severally and jointly liable if the matter in dispute is referred to arbitration by the plaintiff and some of the defendants and an award is made against all the defendants, and the plaintiff withdraws his claim against such of them as do not join the reference, the award can be filed against others. (*Gogan* v. *Narsingh*, 55 P. L. R. 231).

**Matter in difference in suit between the parties.**— There must be a real difference or dispute between the parties to a suit so that section 21 may operate. A dispute implies an assertion of a right by one party and repudiation thereof by another. The existence of dispute or difference contemplated by an arbitration clause is an essential condition of and pre-requisite to the exercise of the jurisdiction by the arbitrator. (*Nandrani* v. *Hanumant*, A. I. R. 1954 Cal. 245). There must be a point of difference between the parties for decision of an arbitrator and it is not enough to state what the point of dispute or difference is after the suit has been filed. (*ibid*), Any question on which the parties join issue, whether the Court can legally enquire into it, is a dispute within the meaning of section 21. (*T. Wang* v. *Sona Wangdi*, 87 I. C. 633 ; 42 C. L. J. 26 ; A. I. R. 1925 Cal. 812). Any agreement as contemplated by this section between the parties should clearly set forth what are the matters in difference between the parties on which the arbitrators are required to arbitrate. Such points should be set forth clearly in the form of issues. (*Puran Singh* v. *Bahal Kunwar*, A. I. R. 1930 All. 319 ; 125 I.C. 583). But there is no provision in this section meeting an agreement to refer to arbitration which sets forth that any matter which might, in future, arise between the parties might also be referred to the decision of the arbitrators, on application of the parties. (*ibid*).

The expression "the matter in difference between the parties" is quite general and it fully covers the case where the parties in partition suit not having agreed among themselves as to how the properties were to be divided referred the question to arbitrators.

(*Radhey Lal* v. *Kanhai Lal*, A. I. R. 1939 Pat. 526 ; 185 I. C. 52 ; 1939 P. W. N. 591). It contemplates a dispute existing at the time for reference and must be limited to the difference which has arisen in the suit. (*Arif* v. *Bengal Silk*, A. I. R. 1949 Cal. 351). Where the reference to arbitration is not clear as to matters referred, courts should not be unreasonable or unduly technical in construing the document when it is drawn up by persons not familiar with law and legal phraseology but at the same time the Court must be satisfied by the language used that a matter decided was in truth referred to the arbitrators for decision. It does not matter whether or not the arbitrators genuinely believed that a particular matter was referred, and the final decision as to whether the particular matter was referred or whether a particular party had consented to refer it lies not with the arbitrators but with the Court. (*Gopalam* v. *Mynam*, A. I. R. 1926 Mad. 752).

The decision of arbitrators on a matter not in difference between the parties not referred to them is null and void for want of jurisdiction. (*Moshalal* v. *Konomutty*, 15 W. R. 172).

The parties had by their application agreed to refer all the matters in dispute to the arbitrator. The Court on making the reference felt that in view of the admissions of the defendants, arbitration was needed only about the difference between the claim and the sum admitted. The Court accordingly ordered that this matter in difference should be referred to the arbitrator. It was *held* that though the parties desired that all the matters in dispute should be decided by the arbitrators including the plea about the legality of the contract of agency, the Court understood the parties to mean that the decision of the arbitrator was required only about the difference between the sum claimed by the plaintiff and the sum admitted by the defendant. The first award did not therefore decide the entire dispute. Though it is not necessary for the arbitrator to give his decision point by point still when the defendant raised a specific issue about the legality of the contract of agency between the parties that issue was one of the matters in dispute and the parties desired it should also be referred to the arbitrator but the judge, however, misunderstood the position and did not refer it to him. The power to refer that portion of the dispute remained so long as the parties intended that it be so referred. Hence the reference made by the Court on application by the parties was not wrong. (*Haji Habib* v. *Bhikham Chand*, A. I. R. 1954 Nag. 306).

**Matters beyond scope of .suit.**—Where in pursuance of an agreement between the parties to get both matters in a pending suit and matters out of suit decided by an arbitrator through the Court, with a view to put an end to the pending litigation,

a reference is made by the Court to arbitration, the reference is vitiated by illegality at its inception, and the award made on such reference cannot be enforced either as an award in the suit or as a compromise by a separate suit. (*Lakshmi Narayan* v. *Nagamma*, 158 I. C. 1071 ; (1935) M. W. N. 1053 ; A. I. R. 1935 Mad. 1053). An agreement to recognise an award beyond the scope of the disputes mentioned in the reference is void and is not binding on the parties to the reference. This principle applies with greater force to an award passed on a reference made through the Court in a pending suit, as in that case the arbitrators derive their authority from the Court and their award must be confined to matters in dispute in the suit. (*Parasrani* v. *Topondas*, A. I. R. 1928 Sind 81 ; 102 I. C. 183). If the parties to a suit apply to the Court for an order of reference with regard to the matter in difference in the suit and on the same day make a reference to arbitration without the intervention of the Court with regard to other matters in dispute between the parties by a separate agreement, the order of reference made by the Court with regard to the subject-matter of the suit cannot be questioned on the ground of illegality or invalidity. So also if the parties in their application for reference to arbitration with regard to matters in difference in a suit put in other matters of difference but the Court makes a reference to the arbitrators only with regard to the matters in difference in the suit without any objection of the parties, such reference is not illegal. (*Jatindra Nath* v. *Manindra Nath*, A. I. R. 1927, Cal. 52 ; 44 C. L. J. 224 ; 98 I. C. 803) Court which has no territorial jurisdiction to decide a matter cannot refer it to arbitration. (*Guardian Assurance* v. *Thakur Shiv*, A. I. R. 1937 All. 208 ; 1937 A. L. J. 98).

**Insolvency proceedings.**—In insolvency proceedings, there are not any matters which may be referred to arbitration. Such proceedings do not fall within the expression "matter in difference between the parties and to the suit" and the insolvency court cannot even with the consent of the parties refer to arbitration the question whether or not the debtor should be adjudged insolvent. (*Ladha Singh* v. *Bhag Singh*, 34 I. C. 549 ; 50 P. R. 1916).

**Matrimonial matters.**—The question of restitution of conjugal rights cannot be referred to arbitration as that matter must be decided by the Court itself. (*Nathu* v. *Sarnum*, A. I. R. 1933 Lah. 532 ; 144 I. C. 179; 34 P. L. R. 283). But in a suit for restitution of conjugal rights, the question as to the validity of a marriage can be referred to arbitration. (*Faiz Ali* v. *Ashraf Khatun*, A. I. R. 1929 Lah. 177 : 30 P.L.R. 600 ; 118 I.C. 464). In the case of *Ishar Das* v. *Visan Bai*, A. I. R. 1930 Lah. 707 ; 31 P. L. R. 380 Jai Lal, J., observed :

"But in A. I. R. 1929 Lah. 177 I have distinguished the two

cases *Kalabatu* v. *Prabhdial*, 45 I. C. 165 ; A. I. R. 1918 Lah. 357 and *Hira* v. *Dina*, 37 P. R. 1895 and have held that these cases decide that the Court is not competent to refer the question of the exercise of its discretion in suits for restitution of conjugal rights to arbitration but other matters in disputes between the parties as distinct from the whole suit can be so referred and the Court can, on the award of the arbitrators or on the facts determined by the arbitrators, decide whether or not it should exercise its discretion in favour of the plaintiff."

The terms of Sec. 21 are exceptionally wide and the Court has jurisdiction to refer for the decision of arbitration any matter in dispute in a matrimonial suit, and the arbitrators are competent to pass an award in respect of such disputes. The Court can pass a decree in terms of such an award. (*Ramuddamma* v. *Kashi Naidu*, A. I. R. 1954 Mad. 269 ; (1945) 1 M. L. J. 396).

In the case *Umer* v. *Dadli*, 98 I. C. 550 ; A. I. R. 1926 Sind 128, the Court observed as follows :

"The applicant in the case filed a suit in the court of the Sub-Judge at Naushahro for a declaration that opponent No. 1 had been given to him in marriage and for an injunction restraining opponents Nos. 2 and 3 from giving away opponent No. 1 in marriage to anyone else. During the progress of the suit, matters in difference between the parties were referred to arbitration under para 1 of Schedule 2 of the Code of Civil Procedure (which is substantially similar to Sec. 21 of the Arbitration Act). The main point argued before us in this application is that the learned Sub-Judge had no jurisdiction to refer the matter in dispute in the suit in question to arbitration, that such a reference amounted to a contract which was opposed to public policy and that it is against public policy that suits which relate to the personal relations between the parties should be referred to arbitration. Certain passages in the book *Arbitration* by *Gopaldas* have been referred to us to the effect that the matters covered by the Divorce Act or the Insolvency Act cannot be referred to arbitration. We do not consider that there is any analogy whatever between proceedings covered by the aforesaid Acts and suits cognizable by a civil court to which the provisions of the Code of Civil Procedure apply. Para 1 of the second schedule of the Civil Procedure Code states in perfectly wide terms that any suit may be referred to arbitration." (*See* also *Kunti Devi* v. *Bholanath*, 194 I. C. 466 : A. I. R. 1941 Pesh. 43).

An agreement between a Parsi husband and wife to live separately is a lawful and binding agreement, and a reference to arbitration of the question as to the amount of the wife's mainten-

ance in the event of their separation, is quite legal. (*Toddiwala* v. *Bai Dinbai*, 59 I. C. 189 ; A. I. R. 1921 Bom. 399). The terms of deeds of separation between a husband and wife are frequently referred to arbitration. (*De Ricci* v. *De Ricci*, (1891) P. 378). It is now settled that there is nothing illegal or contrary to public policy or moral in agreements of this nature, whether they arise out of compromise of suits for dissolution of marriage or otherwise. The right to compromise such suits is a natural corollary to the right to institute them. (*Beasant* v. *Wood*, (1879) 12 Ch. D. 622).

**Probate proceedings.**—A grant of probate is not in the nature of a summary proceedings to be contested by a suit in a civil Court. The grant must be contested in the Court as a probate Court and not in exercise of its ordinary civil jurisdiction. Therefore the Judge has no jurisdiction to allow the dispute relating to the genuineness of a will in a probate proceeding pending before him to be referred to the arbitration or an arbitrator. He has got to be satisfied that the will is a genuine document before the order of granting probate is passed. He cannot delegate these functions to a private individual and decide the point through him. (*Gopi Rai* v. *Baijnath*, A. I. R. 1930 All. 840 ; 1930 A. L. J. 1584). See also *Khela* v. *Chet Ram*, A. I. R. 1952 Punjab 67).

An executor cannot legally make any reference to arbitration which will go against the terms of the will. (*Jnanendra* v. *Jitendra*, A. I. R. 1928 Cal. 275). An executor cannot make a reference to arbitration with the avowed purpose that the terms of a will may be modified and arrangements made for the management and distribution of the estate contrary to the directions of the testator. The case before us is plainly not one of submission to arbitration by an executor for the settlement of any debt, account or claim in relation to the estate in his hands. The arbitrators can, no doubt, be asked to construe the will and it need not be disputed that pure questions of law may be referred to the decision of an arbitrator. (*Stiff* v. *Andrews*, 2 Mad. 6 ; *Ghulam Khan* v. *Mohammad Hasan*, 29 I. A. 51 ; 4 Bom. L. R. 161). Construction of a will does not mean an addition to the terms of the will.

But it has been held by the Patna High Court that though a will directs that a legatee should get his share on attaining a particular age, the decision of the arbitrators appointed by other legatees and executors empowering the legatee to take his share before the particular age is valid. (*Janendra* v. *Suresh Chandra*, A. I. R. 1928 Pat. 7 ; 109 I. C. 821 ; 6 Pat. 556).

**Matters in guardianship proceedings.**—It has been held that the appointment of a guardian to a minor, not being a matter of private right as between parties, is not a question which can be

settled by reference to arbitration. (*Mahadeo* v. *Bindeshwari*, 30 All. 137 ; 5 A. L. J. 101). In this Allahabad case, Aikman, J., observed:

"If rival claimants to a certificate of guardianship are allowed to refer their dispute to arbitration, a door would be opened to collusion and the interests of the minor would suffer." See also *Soma Chetty* v. *Adaikalam Chetty*, A. I. R. 1924 Mad. 484 ; 84 I. C. 613 and *Fazlan* v. *Murad*, 42 P. R. 1882).

**Charity.**—Under the English Law, questions affecting charity may be referred to arbitrator with the consent of Attorney-General. (*Prior* v. *Hambrow*, (1841) 10 L. J. Ex. 371). But in India where a suit cannot be brought under Section 92 of the Code of Civil Procedure except on the conditions therein specified the section cannot be evaded merely by a reference to arbitration upon contention raised in the written statement, and the arbitrators cannot decide upon mattars of public right which the law provides shall be brought into issue only in a particular manner. (*Ganga Ram* v. *Keshav Das*, 170 I. C. 102 ; A. I. R. 1937 Sind 174). A suit under Section 92 of the said Code is not a suit for determination of private right of parties and the matters in such suit cannot be referred to arbitration (*Ganoba* v. *Narayan*, A. I. R. 1923 Nag. 112 ; 6 N. L. J. 7 ; 72 I. C. 1016).

But disputes regarding private trust can be referred to arbitrators. (*Narain Sri* v. *Ram Lakhan*, 151 I. C. 148 ; 1934 A. L. J. 711 ; A. I. R. 1934 All. 368 ; *see* also A. I. R. 1947 Sind 74). A suit in which the plaintiff prays for a declaration that he is a *gadisar* of a property which is neither alleged nor found to be a trust property created or existing for a public purpose of a charitable or religious nature is not a suit falling within Section 92 of the C. P. C. because neither the subject-matter nor the reliefs claimed are such as are contemplated by Section 92. Hence a reference to arbitration in such suit is not invalid or prohibited. (*Gurmukh Singh* v. *Lalu Singh*, 277 I. C. 61 , A. I. R. 1947 Sind 74).

A declaratory suit praying for an arbitration by a widow to be declared invalid and not binding on the plaintiff, can be referred to arbitration. (*Hari Shankar* v. *Amraoti*, A. I. R. 1944 Lah. 280).

Where an award does not deal with the question of management of a mosque but only determines which party can use the mosque and decides one of them to be so entitled, such award is not open to objection. (*Hashmat* v. *Siddiq*, A. I. R. 1927 All. 128 ; 98 I. C. 998).

**Criminal matters.**—All civil matters may be referred to arbitration, but matters which are purely criminal and give rise to no

civil remedies, cannot be referred to arbitrators. (Halsbury's *Laws of England*, Vol. 1, p. 628). A criminal complaint cannot be referred to arbitration and therefore the award following it cannot be made a rule of a Civil Court. (*Malka* v. *Sardar*, A. I. R. 1929 Lah. 349 ; 30 P. L. R. 122 ; 116 I. C. 215 ; *Kamini* v. *Birendra*, A. I. R. 1930 ; P. C. 100 ; 32 Bom. L. R. 639).

An agreement to refer to arbitration in respect of non-compoundable offence is opposed to public policy. (*Gopal* v. *Lakshmi* A. I. R. 1933 Cal. 817 ; *Bakhtawar* v. *Isardas*, A. I. R. 1934 Sind 71).

In *Nihal Singh* v. *Ashtawaker*, A. I. R. 1930 Lah. 860 ; 127 I. C. 705, it was held that a compoundable criminal case can be referred to arbitration. The law relating to the compounding of offence is laid down in Section 345 of the Code of Criminal Procedure which is reproduced below for ready reference :

"345. *Compounding offences.*—(1) The offences punishable under the sections of the Indian Penal Code specified in the first two columns of the table next following may be compounded by the person mentioned in the third column of that table :—

| Offence | Sections of the Indian Penal Code applicable | Persons by whom offence may be compounded |
|---|---|---|
| Uttering words, etc., with deliberate intent to wound the religious feelings of any person. | 298 | The person whose religious feelings are intended to be wounded. |
| Causing hurt ... | 323, 334 | The person to whom the hurt is caused. |
| Wrongfully restraining or confining any person. | 341, 342 | The person restrained or confined. |
| Assault or use of criminal force | 352, 355, 358 | The person assaulted or to whom criminal force is used. |
| Unlawful compulsory labour | 374 | The person compelled to labour. |

| Offence | Sections of the Indian Penal Code applicable | Persons by whom offence may be compounded |
|---|---|---|
| Mischief, when the only loss or damage caused is loss or damage to a private person. | 426, 427 | The person to whom the loss or damage is caused. |
| Criminal trespass ... | 447 | The person in possession of the property trespassed upon. |
| House trespass ... | 448 | |
| Criminal breach of contract of service. | 490, 491, 492 | The person with whom the offender has contracted. |
| Adultery ... | 497 | |
| Enticing or taking away or detaining with criminal intent a married woman. | 498 | The husband of the woman. |
| Defamation ... | 500 | The person defamed. |
| Printing or engraving matter, knowing it to be defamatory. | 59 | |
| Sale of printed or engraved substance containing defamatory matter, knowing it to contain such matter. | 501 | |
| Insults intended to provoke a breach of the peace. | 504 | The person insulted. |
| Criminal intimidation except when the offence is punishable with imprisonment for seven years. | 506 | The person intimidated. |
| Act caused by making a person believe that he will be an object of divine displeasure. | 508 | The person against whom the offence was committed. |

(2) The offences punishable under the section of Indian Penal Code specified in the first two columns of the table next following may, with the permission of the Court before which any prosecution for such offence is pending, be compounded by the persons mentioned in the third column of that table :—

| Offence | Section of the Indian Penal Code applicable | Persons by whom offence may by compounded |
|---|---|---|
| Voluntarily causing hurt bv dangerous weapons or means. | 324 | The person to whom hurt is caused |
| Voluntarily causing grievous hurt. | 325 | The person to whom hurt is caused, |
| Voluntarily causing grievous hurt on grave and sudden provocation. | 335 | Ditto. |
| Causing hurt by doing an act so rashly and negligently as to endanger human life or the personal safety of others. | 337 | Ditto. |
| Causing grievous hurt by doing an act so rashly and negligently as to endanger human life or the personal safety of others. | 338 | Ditto. |
| Wrongfully confining a person for three days or more. | 343 | The person confined. |
| Wrongfully confining for 10 or more days. | 344 | Ditto. |
| Wrongfully confining a person in secret. | 346 | Ditto. |
| Assault or criminal force in attempting wrongfully to confine a person. | 357 | The person assaulted or to whom the force was used. |

| Offence | Sections of the Indian Penal Code applicable | Persons by whom offence may be compounded |
|---|---|---|
| Theft, where the value of property stolen does not exceed two hundred and fifty rupeees. | 479 | The owner of the property stolen. |
| Theft by clerk or servant of property in possession of master, where the value of the property stolen does not exceed two hundred and fifty rupees. | 381 | The owner of the property stolen. |
| Dishonest misappropriation of property. | 403 | The owner of the property misappropriated. |
| Criminal breach of trust, where the value of the property does not exceed two hundred and fifty rupees. | 406 | The owner of the property in respect of which the breach of trust has been committed. |
| Criminal breach of trust by a carrier, wharfinger, etc., where the value of the property does not exceed two hundred and fifty rupees. | 407 | The owner of the property in respect of which the breach of trust has been committed. |
| Criminal breach of trust by a clerk or servant, where the value of property does not exceed two hundred and fifty rupees. | 408 | Ditto. |
| Cheating ... ... | 417 | The person cheated. |
| Cheating a person whose interest the offender was bound, by law or by legal contract, to protect. | 418 | Ditto. |

| Offence | Section of the Indian Penal Code applicable | Persons by whom offence may be compounded |
|---|---|---|
| Cheating by personation ... | 419 | The person cheated. |
| Cheating and dishonestly inducing delivery of property or the making, alteration or destruction of a valuable security. | 420 | Ditto. |
| Fraudulent removal or concealment of property, etc., to prevent distribution among creditors. | 421 | The creditors who are affected thereby. |
| Fraudulently preventing from being made available for his creditors a debt or demand due to the offender. | 422 | Ditto. |
| Fraudulent execution of deed of transfer containing false statement of consideration. | 423 | The person affected thereby. |
| Fraudulent removal or concealment of property. | 424 | The person affected thereby. |
| Mischief by killing or maiming animal of the value of ten rupees or upwards. | 428 | The owner of the animal. |
| Mischief by killing or maiming cattle, etc., of any value or any other animal of the value of fifty rupees or upwards. | 429 | The owner of the cattle or animal. |
| Mischief by injury to work of irrigation by wrongfully diverting water when the only loss or damage caused is loss or damage to a private person. | 430 | The person to whom the loss or damage is caused. |

| Offence | Sections of the Indian Penal Code applicable | Persons by whom offence may be compounded |
|---|---|---|
| House-trespass to commit an offence (other than theft) punishable with imprisonment. | 451 | The person in possession of the house trespassed upon. |
| Using a false trade or property mark. | 482 | The person to whom loss or injury is caused by such use. |
| Counterfeiting a trade or property mark used by another. | 483 | The person whose trade or property mark is counterfeited. |
| Knowingly selling, or exposing or possessing for sale or for trade or manufacturing purpose, goods marked with a counterfeit trade or property mark. | 486 | The person whose trade or property mark is counterfeited. |
| Marrying again during the lifetime of a husband or wife. | 494 | The husband or wife of the person so marrying. |
| Uttering words or sounds or making gestures or exhibiting any object intending to insult the modesty of a woman or intruding upon the privacy of a woman. | 509 | The woman whom it was intended to insult or whose privacy was intruded upon. |

In the case *Nand Kishore* v. *I. M. Commissioner*, A. I. R. 1953 Cal. 415 at p. 421, Bachawat. J., observed :

"There is no doubt that the agreement of reference to arbitration is void if either the consideration or object thereof is the dropping of prosecution for a non-compoundable offence. The relevant principles admit of no doubt and are now settled by the

highest judicial authority. (*Sir Benod Mitter* in the case *Kamini Kumar* v. *Birendea Nath*, A. I. R. 1930 P. C. 100 at P. 102 states the law as follows :

"If it was an implied term of the reference or the *ekrarnama* that the complaint would not be further proceeded with, then in their Lordships' opinion the consideration of reference or the *ekrarnama*, as the case may be, is unlawful, and the award is invalid, quite irrespective of the fact whether prosecution had been started."

In *Hussain Mahomed* v. *Ismail*, A. I. R. 1935 Sind 10; 156 I. C. 383, the Court observed :

"The proposition that a reference and award are vitiated if the consideration therefor or even a part thereof is the stifling of a criminal prosecution is not and cannot be disputed. Nor can it be contended that it is necessarily that a prosecution should actually be pending in order that this principle should apply. But then in the present case there was neither a criminal prosecution for a non-compoundable offence pending or within the power of the respondent No. 1 to threaten. All that there was, was an application to the Court under Section 476 of the Code of Criminal Procedure. I am not prepared to hold that the withdrawal of an application under Section 476 of the said Code and the fact that it forms part of the consideration for the reference executed by the parties in this case is sufficient to vitiate the reference and award on the ground put forward by respondent No. 2."

An agreement the consideration for which is the compounding of a compoundable offence, is not prohibited by law and is, therefore, valid. But an agreement to compound a non-compoundable offence is illegal. If the offence is compoundable with the permission of the Court (say, under Section 420, I. P. C.), the validity or otherwise of the reference and the award depends upon whether the permission of the Court has been obtained or not.

**Quasi-criminal matters.**—It is not permissible to refer to arbitration the subject-matter of a proceeding under Chapter X of the Code of Criminal Procedure in respect of a public nuisance in which public interests are involved. (*Ajit Shaikh* v. *Jamatulla*, 62 I. C. 335, 22 Cr. L. J. 511).

Proceedings under Section 145 of the said Code cannot be compromised nor can they be submitted to arbitration. All that can be done is that there may be an agreement as to the mode of taking evidence as regards actual possession on the date of the preliminary order either by a Commissioner or by arbitrators. Such a commissioner or arbitrators have no power to decide the case but

can only submit a report, and the Magistrate would then be bound to take the report into consideration before passing an order. (*Gangadhar* v. *Balkrishna*, A. I. R. 1929 Nag. 285 ; 121 I. C. 47).

**Proceedings under Agriculturists Relief Act.**—Proceedings under Section 12 of the U. P. Agriculturists' Relief Act are proceedings in a suit before a Civil Court to which the Arbitration Act applies and hence a reference to arbitration of the dispute between the parties to such proceedings is competent and lawful. (*Balaram* v. *Dudh Nath*, 1948 A. L. J. 296 ; A. I. R. 1949 All. 100).

**May apply.**—The use of the word "may" in Section 21 shows that the provisions of the section are permissible and not mandatory. (*Basdeo* v. *Jagannath*, 131 I. C. 443 ; A. I. R. 1931 Oudh 127).

**At any time before judgment is pronounced.**—The application under this section can be made to the Court at any time before the judgment is delivered. Judgment in section 21 means only a judgment which finally decides all matters in controversy and not an interlocutory one which still leaves any of the matters in dispute undecided. A Court has jurisdiction to refer the matters in dispute until it passes a final decree. The mere passing of a preliminary decree or the tendency of an appeal against the preliminary decree does not prevent the court from exercising the power. There is nothing in Section 21 to limit the power of the Court to any such manner. (*Chidambaram* v. *Subramanian*, (1952) 2 M. L. J. 524 ; A. I. R. 1953 Mad. 492).

**Apply in writing.**—Not only the writing out of an application to refer a pending suit to arbitration but the presentation of it must have the concurrence of all parties concerned. In other words, the parties interested must not only agree to refer the matter in difference between them to arbitration but they all must apply to the Court for making an order of reference. After agreeing to refer, either party has a *locus penitential* to withdraw before the order of reference is made and he may take advantage of it. (*Mohammad Yasin* v. *Allah Din*, 142 I. C. 678 ; 34 P. L. R. 24).

Although no formal agreement to refer is necessary, an application in writing is necessary for a reference under Section 21. The provisions that the application shall be in writing, is directory only and not mandatory. An application under Section 21 should be signed by all the parties interested in the settlement of the suits. (*Neju Puran* v. *Hira Singh*, 1 I. C. 146 ; 6 A. L. J. 333). The matter in difference should be clearly set forth in the application. If it is so vague as to make it impossible to ascertain what the dispute was which was referred to arbitration, the reference would be bad

for indefiniteness. (*Babu Lal Pradhan* v. *Badri Lal*, A. I. R. 1919 Pat. 74 ; 49 I. C. 522). The application should be presented by all the parties interested. Where nobody signs on behalf of a party and nobody proposes to verify the petition before the Court on his behalf, he is not a party to the reference to arbitration. (*Mohmmad* v. *Nanhe*, A. I. R. 1931 All. 242 ; 130 I. C. 291). However, where a person was a consenting party and agreed to the reference, the mere fact that he did not sign the application for reference to arbitration would not be enough to invalidate the reference. (*Madho Prasad* v. *Kanhaiyalal*, A. I. R. 1946 All. 1). Thus where a reference was signed by the party's son and pleader, and he appeared before the arbitrator personally, the reference was held valid. (*Sharafat Ali* v. *Bhagwati*, A. I. R. 1929 All. 763 ; *Jaimal Singh* v. *Tibram*, A. I. R. 1930 Lah. 523 ; 122 I. C. 100). The record of an agreement to refer to arbitration in the Court's proceedings which are signed by both the parties and their respective pleaders constitute sufficient compliance with the requirements of Section 21, even though there is no written application to the Court by the parties. (*Jag Mohan* v. *Suraj Narain*, 158 I. C. 300 ; A. I. R. 1935 Oudh 499). The award cannot, however, be set aside merely because there is no application in writing if both the parties appear and conduct the case before the arbitrator. (*Abdul Hamid* v. *Reazuddin*, 30 All. 32 ; *Waliullah* v. *Bhaggan*, A. I. R. 1925 Oudh 269). Where the parties made a direct reference to the arbitrator but expressly informed the Court that they had so referred the case and asked for time over and over again, it was held that the various applications for adjournment amounted in substance to a reference of the dispute between the parties by the Court. (*Kulsum Fatma* v. *Ali Akbar*, A. I. R. 1917 All. 71 ; 39 I. C. 370 ; *Venkatachalam* v. *Ramanathan*, A. I. R. 1922 Mad. 429 ; 70 I. C. 410).

Where the plaintiff's claim was made jointly and severally aganist all others the father and his two sons individually as partners in the firm with which the plaintiffs had dealings, although, the fact that two of the defendants (the sons) had allowed the proceedings in the suit to be taken against them *ex parte* might be interpreted in a loose sense that they were not interested, but in the legal sense it must be held that they were interested when in such a case the matter was referred to arbitration by the plaintiff and by one of the defendants, namely the father, the reference is invalid. (*Nar Singh* v. *Firm*, A. I. R. 1955 Punjab 31).

When it is agreed that the matter in dispute between the parties as set out in their pleading should be referred to arbitration, it cannot be characterised as vague and indefinite simply because the points have not been specifically set forth. (*Jag Mohan* v. *Suraj*, A. I. R. 1935 Oudh 499).

**To the Court.**—The application under section 21 must be made to the Court in which the suit is pending. If an application for making a reference is presented before the Commissioner appointed for examining a witness, the presentation is sufficient and it constitutes sufficient compliance with the provisions of law. (*Mohar Singh* v. *Amar Singh*, A. I. R. 1933 Oudh 521).

*Court* as defined in the Arbitration Act does not include an appellate court and consequently there is nothing in the Act which enables an appellate Court to refer to arbitration the matters in dispute between the parties. (*Abani Bhusan* v. *Hem Chandra*, A. I. R. 1947 Cal. 93 ; 227 I. C. 163 ; 50 C. W. N. 833 ; but *see Thakur Prasad* v. *Baleshwar*, A. I. R. 1954 Pat. 106). It is not correct to say that the Arbitration Act does not apply to Revenue Court. (*Raghubar* v. *Brijmohan*, 1945 R. D. 315 ; 1945 A. W. R. (Rev.) 116).

There is a difference of opinion between various High Courts upon the question whether a civil court executing a decree has jurisdiction to refer a dispute between the parties to arbitration. The Calcutta and Peshawar High Courts have held that the executing Court cannot make any reference to arbitration and the award, if any, made by the arbitrator is illegal. (*T. Wang* v. *Sona Wangdira*, A. I. R. 1925 Cal. 812 and *Gafooran* v. *Hamid*, A. I. R. 1938 Pesh. 80). But a learned single judge of the Oudh Chief Court has held that there is no reason to restrict the meaning of the term "suit" in Section 21 in such a way as to exclude the execution proceeding which means merely a continuation of the suit. (*Jafar* v. *Gafoor*, A. I. R. 1943 Oudh 304).

**Judge as arbitrator.**—We meet with cases where the parties to a suit leave their disputes to be decided by the presiding judge as he thinks just, and agree, without a right of appeal, to accept it as finally binding on them.

In so far as Oudh is concerned it is enacted by R. 678 of the Oudh Civil Rules that "No Judge or Ministerial Officer of a Civil Court shall accept the office of arbitrator without the permission of the Government being first obtained" and similar regulations are in force in the Agra Province also. But without adverting to the rules or ignoring them parties to suits pending trial by a judge have, in some cases, been seen to express their willingness to leave the matter to be judged by the presiding judge and to accept that decision as final without resort to appeal, and the judges have given their decisions. The question whether in that event the decision is illegal by reason of its contravention to the departmental rules adverted to above has been decided in the negative. It was observed by the learned Judges of the Allahabad High Court in A. I. R. 1928 All. 497 : "The existence of these regulations should not

influence us in deciding this case. They are departmental regulations for the breach of which (if there has been a breach) the judge can be taken to task by his superior officers : but the regulations do not constitute a rule of procedure applying to the trial of suits. Departmental rules are rules of wisdom, not mandatory, but recommendatory, and non-compliance with them does not vitiate the trial.

The validity of a decision come to by a Judge who has been invited and requested by the parties to give his own decision in his own way rests on high authority. Thus, in (1896) A. C. 136, which is the leading case on the point, the law is stated thus : "It has been held in this House that where with the acquiescence of both the parties a judge departs from the ordinary course of procedure and decides upon a question of fact, it is incompetent for the parties afterwards to assume that they have then an alternative mode of proceeding, and to treat the matter as if it has been heard in due course," and after referring to the case in (1847) 1 H. L. (Sc.) 70, they observe: "In none of these cases did the House of Lords say anything to suggest that it is improper for a judge to try a question of fact by some method other than that prescribed by the law governing his court, if the parties request him to do so." It is commonsense that the consent of the opposing parties is a panacea that cures all ills.

It is now settled law that a Judge acting at the request of the parties acts not as an Arbitrator but as a Judge "extra cursum curiae". In *A. I. R. 1923 Madras 444*, the suit related to diversion of water and the question was whether it was lawful or unlawful. The parties put into Court certain plans and documents and requested the Judge by writing signed by both the parties, to decide the matter according to the opinion which the Court might entertain without going into any further evidence. The matter went up in appeal, and the main question argued was whether an appeal was competent. The first appellate court held that no appeal lay as the decision was by the Judge, "extra cursum curiae." The High Court, however, held that unless the parties agreed not to appeal, the right of appeal cannot be taken away. But the decision was held to be not as Arbitrator but as Judge "extra cursum curiae".

In *A. I. R. 1924 Sind 134*, the parties asked the Judge to dispose of the case on documentary evidence alone. They agreed not to adduce evidence and asked the Judge to inspect the locality. It was held that the decision given was by the Judge as Judge and not as arbitrator.

The principle that is deducible from the above cases is that the parties will not be entitled to question the mode of decision which they themselves invited the Judge to adopt and in regard to

the question of the right of appeal an appeal will lie if it is not part of the agreement that they will not appeal.

In *A. I. R. 1947 Sind 185*, the plaintiff and the defendant appointed the Presiding Judge as Arbitrator for the final settlement of their dispute, binding themselves to accept his award with or without issues, with or without evidence, and with or without details and agreeing to abide by his decision and not to appeal against it. It was held that what the parties intended was that they asked the Judge to decide their dispute as a Judge in his own way ignoring the rules of evidence and adopting a procedure unknown to law—unknown because, under that procedure, the Judge was to leave, as it were, his judicial chair, sit in the chair of the Arbitrator, appear before himself and then again assume his judicial chair. The decision was not by the judge, as Arbitrator, but as Judge 'extra cursum curiae'. A Judge sitting in Court cannot possess a dual capacity. When in such a case the parties describe him as Arbitrator, he does not become one by reason of that incorrect description.

The case in A. I. R. 1947 Cal. 98 wears a different complexion. A suit by A against B and a cross-suit by A against C were filed each of them valued at lakhs and there was a fourth suit by B against A for rent of premises unconnected with the claims in the first and second suits. An agreement in the first two suits and an agreement in the third suit were written and signed by the respective parties. The Arbitrators were appointed, and in the event of their disagreement, Mr. Justice Ameer Ali of the Calcutta High Court was to give his decision as "umpire". It must be noted that the suits were not pending before Mr. Justice Ameer Ali, and a fourth suit remained untouched. The two Arbitrators disagreed—one deciding for the dismissal of all the suits, and the other Arbitrator passing a decree for two lakhs to A against B and dismissing all other claims. The matter came before Ameer Ali, J. sitting as Judge of Calcutta High Court. He gave Judgment, signing merely as 'Ameer Ali' without any designation. This was accompanied by "minutes" which was signed by him as "umpire" giving details of the Judgment, dismissing all the suits of all the parties (including the fourth suit by B against A) and saying that no party will have against any other party any right of any kind or costs. The award, being objected to the matter came before Das J. who set aside the decree, as that of an Arbitrator. It was contended that the decision was by the Judge as Judge "extra cursum curiae" and was not liable to be challenged. It was held 'No' and that it was a clear case of Arbitration within the Arbitration Act.

When the parties merely agree that they will abide by the

decision when the Court may give, after taking such evidence as it thinks fit or after inspecting the papers, the Court does not act as arbitrator since the provisions of Chapter IV imply necessarily that when a dispute in a pending suit is referred to arbitration the arbitrator must be person other than the Presiding Judge in the Court and therefore the provisions of the Arbitration Act will not apply. (*Dalal* v. *Jamadar*, A. I. R. 1945 Bom. 478 ; 47 Bom. L. R. 388).

22. **Appointment of arbitrator.**—The arbitrator shall be appointed in such manner as may be agreed upon between the parties.

### Comment

**Appointment of arbitrator.**—Section 21 of the Arbitration Act provides that if the parties to a suit are desirous that the matters in difference between them in the suit, or any such matters, shall be referred to the decision of one or more arbitrators, they may apply to the Court at any time before final judgment for an order of reference. Section 22 provides that the arbitrator or arbitrators shall be nominted by the parties in such manner as may be agreed upon between them. The Court has no power to appoint an arbitrator except in the manner agreed upon between the parties. If the parties cannot agree with respect to the nomination of the arbitator or arbitrators, or if the person or persons nominated by them refuse to accept the arbitration, and the parties are desirous that the nomination shall be made by the Court, the Court shall appoint the arbitrator or arbitrators. Thus the parties must either name the arbitrators or consent to the nomination of them by the Court. See section 25 also. The nomination by the Court is dependent on the desire of the parties.

Before a Judge refers a case for arbitration, he should ascertain whether the persons nominated are willing to accept the office and till he has done so, any nomination of an arbitrator by him, without the application or consent of the parties, is illegal. (*Hurronath* v. *Kashinath*, W. R. Gap. 338). Subsequent acquiescence in the proceedings of the arbitrators will not validate the reference if it was made by the Court without jurisdiction. (*Fayazuddin* v. *Aminuddin*, 6 A. L. J. 351 ; 1 I. C. 354).

23. **Order of reference.**—(1) The Court shall, by order, refer to the arbitrator the matter in difference which he is required to determine, and shall, in the

order specify such time as it thinks reasonable for the making of the award.

(2) Where a matter is referred to arbitration, the Court shall not, save in the manner and to the extent provided in this Act, deal with such matter in the suit.

## Comment

**Scope of the section.**—Section 23 sets out like two previous sections 21 and 22 the initial steps to be taken for arbitration in a suit. In order to vest jurisdiction in the arbitrators to deal with a pending suit, it is necessary that the Court should make an order under section 23 (1) referring the suit to them and should specify in the order such time as it thinks reasonable for the making of the award. It is only when the matter is referred to arbitration by the Court in that manner that under section 23 (2) the Court ceases to have jurisdiction to deal with the suit or such matters therein as are referred to arbitration. (*Narayanswami* v. *Manika*, A. I. R. 1946 Mad. 86 ; (1945) 2 M. L. J. 482).

**Ordinary agreement and agreement to refer through Court.**—An agreement to refer to arbitration placed under the direction of the Court, cannot be treated as an ordinary contract revocable by consent at the will of the parties, or by one of them on pain of damages, for the Court must not be allowed to be trifled with nor the course of litigation to be confused by repeated changes of procedure at the behest of litigants. To this extent the statutes relating to arbitration can certainly abrogate the old common law rule that an agreement is revocable at will. Parties to reference, therefore, cannot merely abandon an arbitration by consent. (*Prafulla* v. *Punchanan*, A. I. R. 1946 Cal. 427 ; (1946) 1 Cal. 398). In this case, Akram, J., said :

"Once the dispute goes to arbitration, the authority of the Court to proceed with the suit is suspended and it cannot deal with the subject-matter of the reference so long as the reference stands ; it is only when the arbitration is superseded that the suit as it were revived and the matter in dispute can be dealt with by the Court. Where a compromise is alleged by one party but disputed by the other, the Court cannot embark upon an enquiry and determine whether in fact there has been a compromise. Such an enquiry will necessitate dealing with the subject-matter of the reference and that would be contrary to section 23 (2) and section 25, proviso of the Arbitration Act."

*Sub-section (1)*

**The Court shall, by order, refer.**—The provisions of this

section are mandatory. Where the parties have agreed to have their dispute settled by arbitration, it is incumbent on the Court to pass an order referring the matter to arbitration. The omission to pass an order of reference to arbitration will vitiate the whole arbitration proceedings and there can be no legal award without such an order. (*Hurchand* v. *Chuttan Lal*, 35 P. R. 1884). The parties to a case expressly informed the Court that they had referred the case to a certain arbitrator and asked the Court over and over again to grant time for the preparation and submission of that arbitrator's award. It was held that the orders passed by the Court upon the various applications for adjournment amounted in substance to the reference of the dispute between the parties by the court to the decision of the arbitrator. (*Kulsum* v. *Ali Abbar*, 39 I. C. 730; 15 A. L. J. 452).

Notwithstanding that much time of the Court may have been occupied in hearing a case, still the law distinctly gives the parties to a suit a right to have the matter submitted to arbitration if they come to an agreement to refer it to an arbitrator at any time before the judgment is pronounced. It is quite clear on the provisions of section 23 that the Court has no discretion in the matter and where the parties to a suit come to an agreement in writing by which they agree to refer to the arbitration of certain arbitrators and apply to the court to refer the suit to them, the Court cannot reject the application because it is untimely. (*Mahendra Lal* v. *Fakir Chandra*, 24 I. C. 610; *Datta* v. *Khedu*, 8 A. L. J. 678 ; 11 I. C. 935; 33 All. 645).

Where the reference is through a Court, the arbitrator will of necessity, be informed of the agreement of the parties and the order of reference, so that he might make his award within the time fixed by he Court. But where the arbitrator is fully aware of the terms of reference, accepts the office of arbitrator and actually decides the controversy between the parties by giving award, the mere fact that the order of reference was not formally communicated to him will not vitiate the arbitration. (*Manilal* v. *Pahlad Das*, 167 I. C. 21; A. I. R. 1937 All. 144; 1937 A. L. J. 204).

The plaintiff and the only defendants interested in the subject matter of the suit agreed in writing to refer their dispute including that in the suit to the arbitrator and the plaintiff presented an application that as, the matter in the suit as well as other matters had been referred to arbitration, the suit should be kept pending or adjourned till the award was made. The Court granted adjournment accordingly and kept the suit pending. It was held by the Madras High Court that this was a reference in substance, though not in form. (*Venkatachelam* v. *Ramnath*, A.I.R. 1922 Mad. 429). But Sec. 23 does not authorise the Court to compel any of the parties

to go to arbitration on a matter which he has not agreed to be referred to arbitration. It has also no power to nullify a reference lawfully made by an addition, to the matter referred, of some matter by amendment of plaint. (*Shital* v. *Nihal Chand*, A. I. R. 1942 Sind 7).

An appellate Court has no power to refer matter to arbitration. Under Sec. 21, only parties to the suit are competent to apply for arbitration and as parties to an appeal are not authorised, the appellate Court will not be able to act under Sec. 23. (*Shuknella* v. *Rahmat*, 1947 A. L. J. 445; A. I. R. 1947 All. 304).

**Matter in difference.**—See under section 21. The Court has no jurisdiction to refer to arbitration matters which are not in difference in the suit. Matters in difference in a suit are ascertained from the pleadings which have been filed in the suit before an agreement and an order of reference is made, and therefore these differences must exist at the time of the agreement and do not include differences which arise thereafter. (*Prabodh Kumar* v. *Eichpolse Trading Co.*, I. L. R. (1947) 1 Cal. 572).

**Shall in the order specify such time as it thinks reasonable.**—Section 23 is not merely directory but it is mandatory and imperative. (*Roja Narain Singh* v. *Bhagwat Kunwar*, 18 I. A. 55; 13 All. 300). Sub-section (1) deals with two matters. Firstly when section 21 has been complied with, the Court must make the order of reference. Secondly, the Court by its order must fix such time as it thinks reasonable for the making of the award. Sub-section (2) forbids the interference of the court save in the manner and to the extent provided in the Arbitration Act. Here there are the following three things which go together :—

(*i*) The Court must part with its jurisdiction to decide;

(*ii*) The Court must part with it for a specified time and no more, and

(*iii*) During that time, it must stand aside.

If a court should wrongly refuse an order of reference and insist upon deciding the suit, its decree would be bad apart from any question of the merits. If after an order of reference a court wrongly proceeded to try a suit, it would contravene an express prohibition. If by the order of reference no time is fixed at all, the error is of the same class ; no time-limit means no control, and the Court is not authorised to abandon control save to the extent and upon the terms laid down. (*Rabindra* v. *Jogendra*, 80 I. C. 459; A. I. R. 1923 Cal. 410; 27 C. W. N. 420).

Where time is fixed for hearing of a case and not for filing of an award the defect is only irregularity and can be cured. (*Raja Harnarain* v. *Bhagwant Koer*, 13 All. 300 (P. C.)). Where the order of reference did not specify a date but subsequently intimated to the arbitrator about the time within which the award should be filed, the irregularity would not affect the validity of the award. (*Mani Lal* v. *Pahlad*, A. I. R. 1937 All. 141). If no particular time is fixed by the court for making the award, it will be taken to have been made within the time notwithstanding that it was made after the rising of the Court on the date. (*Radha Kant* v. *Jaldhar*, A. I. R. 1916 Pat. 21).

Where proceedings before an arbitrator have gone on for some time, the evidence has been closed and the case is ready for arguments and giving of decision, and the arbitrator who has only obtained two former *extensions of time for filing the award*, applies only for one more fortnight's time, it is an arbitrary exercise of jurisdction to refuse it and supersede the arbitration and thereby cause grave miscarriage of justice. (*Chinman* v. *Brij Mohan*, A. I R. 1943 Oudh 117). *See* also section 28.

**Making of the award.**—See also under section 14.

An award is said to be made when it is completed and signed by the arbitrator. (*Ram Autar* v. *Deoki*, 37 All. 456; 29 I. C. 844; *Arugam* v. *Aranechlla*, 22 Mad. 22 ; *Gopalji* v. *Chagan Lal*, 45 Bom. 1071; *Radha* v. *Jaldhar*, A. I. R. 1956 Pat. 21; 37 I. C. 844 ; *Akhoy* v. *Das*, A. I. R. 1935 Cal. 359 : 156 I. C. 165). The word "make" has been used in a non-technical sense and means that the mind of the arbitrator has been declared and such declaration need authentication by the signature of the arbitrator. (*Assadulla* v. *Mohammad Noor*, 27 All. 459). The making of an award is complete when the arbitrators put their signatures on it. (*Sri Lal* v. *Arjun Das*, 27 I. C. 233 ; 18 C. W. N. 1325).

The Court allowed the arbitrators to make their award within a certain time but, instead of using the word "make", used the word "file" and the award was made in Hindi and signed within that day but was filed two days later, as the arbitrators decided to have it translated into English. The arbitrators also, before filing it took an agreement from the parties not to raise any objection to this being done. It was held that the award was made within time and was valid and that the use of the word "file" instead of "make" was immaterial. (*ibid.*). There is nothing in Chapter IV of this Act to show that an award would be invalid if not filed on or before the time fixed for the filing of it in the Court. All that is required by section 23 is that the Court must fix time for the making of the award, and an award would be valid if made

within the time fixed, though not filed in the Court on the date fixed for submitting the award to the Court. (*Radhakant* v. *Jaldhar* 37 I. C. 844). But the Lahore High Court has taken a contrary view. The expression "making the award" includes the announcement of the award and the award cannot be deemed to have been made till it is announced, and one way of announcing it is by filing in Court. (*Harbhajan* v. *Mina*, A. I. R. 1928 Lah. 753; 110 I. C. 748). It is submitted that the former view is correct as making of an award and the delivery of an award in the Court contemplate different stages.

Where an award was declared by the arbitrators in the presence of both parties on a certain date but signed by them on a later date, the effectiveness of the award is not postponed to the date in which it was signed. The award becomes effective on the date on which the parties are made aware of it. (*Sudhir* v. *Bilasbati*, 45 C. W. N. 223).

*Sub-section (2)*

**Powers of Court after order of reference.**—The words "shall not save in.....matter in the suit" in sub-section (2) of section 23 are imperative and convey a prohibition and limit the Court's jurisdiction. (*Sankar* v. *Chunilal*, A. I. R. 1926 Nag. 37; 89 I. C. 782). Since the moment the order of reference is made, the Court's jurisdiction to deal with the merits of the matter in difference referred to arbitration is suspended and it revives only in the event of the arbitration being ordered to be superseded under paras 5, 8 and 15 of the Schedule.

In the case *Kaikobad* v. *Khambata*, A. I. R. 1930 Lah. 26; 124 I. C. 339 ; 31 P. L. R. 668, the Lahore High Court observed :

"So long as the arbitration is proceeding, the power of the Court extends to—

(*i*) the causing of the attendance of witnesses before the arbitrator (section 43) ;

(*ii*) enlarging the time fixed for filing the award, if this is considered necessary (section 28);

(*iii*) giving an opinion on a special case stated by the arbitrator (section 13) ;

(*iv*) appointing another arbitrator and umpire in certain cases (section 8).

The principle of these provisions is that parties having by consent substituted a *forum domesticum* of their own choice in place

of the Court, are bound by the decision on question of law and fact, erroneous though it may be, and the Court which appointed the arbitrator cannot interfere with the award, except in the manner and to the extent described above. (A. I. R. 1930 Lah. 26).

The Court which refers any matter to arbitration, cannot sit in appeal from the decision of the arbitrators nor has a lower appellate court jurisdiction to go into the merits of the case. (*Haradhan* v. *Radhanath*, 10 W. R. 398). The Court has no power to allow a party to withdraw the suit during the pendency of the arbitration. (*Sheoambar* v. *Deodutt*, 9 All. 168). Where a suit is referred to arbitration and is pending before the arbitrators, the Court has no power to dismiss the suit under Order 9, rule 3, Civil Procedure Code, unless an express order superseding the arbitration has been passed. (*Imamdin* v. *Jawahari*, 10 P. R. 1899); *Maharaj Bhagat* v. *Harihar Bhagat*, 65 I. C. 144 ; A. I. R. 1923 Pat. 115 ; *Krishna Kishore* v. *Banwari Lal*, A. I. R. 1929 All. 259 ; 1929 A. L. J. 100 ; 113 I. C. 749). But there is nothing in Sec. 21 to prevent the parties from getting the suit dismissed with consent during the pendency of the arbitration. (*Kokil Singh* v. *Ramasray*, 81 I. C. 994 ; A. I. R. 1924 Pat. 110). Similarly, in a Lahore case it was held that even after a reference to arbitration was made in a pending suit, the parties were not precluded from settling the dispute amicably by mutual agreement, and therefore it was not necessary to cancel the reference before accepting the compromise. (*Aishan* v. *Abdulla*, A. I. R. 1927 Lah. 156 ; 99 I. C. 1002). But in *Dooly Chand* v. *Mohan Lal*, 83 I. C. 606 ; A. I. R. 1924 Cal. 651, a contrary view was taken by the Calcutta High Court.

The Court is competent, in a fit case, to grant interim injunction or to appoint a receiver. (*Chetan Singh* v. *Gulibai*, 78 I. C. 84 ; A. I. R. 1925 Sind 102 ; *Surendra* v. *Sushil*, A. I. R. 1928 Cal. 256).

Where the question of the costs of the litigation incurred prior to the reference is referred to arbitration, the Court is precluded from dealing with the matter in the same suit. (*Hira* v. *Gaya*, A. I. R. 1932 All. 183 ; 1931 A. L. J. 1155 ; 136 I. C. 789). The Court cannot remove an arbitrator to substitute a new one in his place. (*Halimbai* v. *Shanker*, 10 Bom. 381).

Once a dispute goes to arbitration, the authority of the Court to proceed with the suit is suspended and it cannot, so long as the reference stands, deal with the subject-matter of the reference. After the reference to arbitration has been made in a suit through the Court, the parties cannot be allowed, by mere consent, to abandon the arbitration and go on with the suit or ask for a fresh

reference. But if a concluded compromise in undisputed terms be placed before the Court by all the parties, whether before an award has been made or after, the Court may grant leave to revoke the submission under section 5 of the Arbitration Act and, on superseding the arbitration agreement thereafter under section 12 (2) (b), pass a decree in terms of the compromise. But the compromise, before it is accepted, must be considered on its own account as to its validity and cannot be accepted as a matter of course. In no case a compromise can be given effect to by the Court without first superseding the reference. (*Profulla Chandra* v. *Panchanan*, A. I. R. 1946 Cal. 427).

**24. Reference to arbitration by some of the parties.**— Where some only of the parties to a suit apply to have the matters in difference between them referred to arbitration in accordance with, and in the manner provided by, section 21, the Court may, if it thinks fit, refer such matters to arbitration (provided that the same can be separated from the rest of the subject-matter of the suit) in the manner provided in that section but the suit shall continue so far as it relates to the parties who have not joined in the said application and to matters not contained in the said reference as if no such application had been made, and an award made in pursuance of such a reference shall be binding only on the parties who have joined in the application.

**Comment**

**Scope of the section.**—It is possible that some parties only to a suit may be agreeable to having the difference between them settled by arbitration. Section 24 permits this to be done, provided that those differences can be separated from the rest of the subject-matter. But Section 21 provides for reference in a suit when all the parties interested agree. Where the interest of a party not joining in the reference to arbitration is inseparable from that of the other parties who are parties to the reference, Sec. 24 will not apply and cannot be availed of. (*Ram Harakh* v. *Mumtaz*, A. I. R. 1949 All. 679 ; 4 D. L. R. (All.) 70). The mere fact that all the parties did not join in the reference to arbitration of a dispute is no ground for upsetting the award so far as those people who made the reference were concerned. (*U Po Hlang* v. *Daw Ngwe*, A. I. R. 1941 Rang. 22). Section 24 provides that the suit shall proceed in the Court in respect of the matters which have not been referred to arbitration and of the parties who have not joined

the reference. The award resulting from the reference will be binding only on those who have joined the reference.

Under Sec. 24 the Court has a discretion either to grant or refuse the prayer by some of the parties for reference to arbitration. However, the Court must exercise this discretion in a judicial manner.

**Appeal.**—An appeal lies against the decision of the Court given on merit, and it is not open to the party aggrieved by the award to challenge and press his objection against the award. The aggrieved party can invoke the aid of Sec. 39 (I) (vi).

**Revision.**—Where all the parties interested in the dispute do not join in the reference to arbitration, the reference is invalid and the High Court will interfere in revision and at the instance of a person who is interested in the dispute and is not made a party to the reference. But the High Court will not interfere and set aside the award in revision at the instance of a party who joins in the reference to arbitration, takes part in it and, having lost it, is trying to back out of it. (*Achisan* v. *Babar Ali*, A. I. R. 1945 Cal. 156 ; I. L. R. (1944) 1 Cal. 619 ; 79 C. L. J. 123).

**25. Provisions applicable to arbitrations under this Chapter.**—The provisions of the other Chapters shall, so far as they can be made applicable, apply to arbitrations under this Chapter :

Provided that the Court may, in any of the circumstances mentioned in sections 8, 10, 11 and 12, instead of filling up the vacancies or making the appointments, make an order superseding the arbitration and proceed with the suit, and where the Court makes an order superseding the arbitration under section 19, it shall proceed with the suit.

**Comment**

**Scope of the section.**—According to section 25, the other provision contained in other Chapters of the Arbitration Act can apply, with necessary modifications, to arbitrations in suits. This section has given additional powers to the Court if circumstances arise for filling up the vacancies or making new appointment of arbitrators, to do neither and instead the Court can supersede the arbitration and proceed with the suit.

Where in a pending suit the underlying object of an agreement to refer to arbitration is to entrust the determination of the matters

in difference to a person of their own choice and not that if the named arbitrator is unable to act for one reason or another, the arrangement is automatically to come to an end, and the Court has no jurisdiction to refer the matters to another arbitrator. Section 8 read with section 25 of the Arbitration Act will apply to such a case. (*Jawar Lal* v. *Jagdish*, A. I. R. 1951 All. 335 ; 6 D. L. R. (All.) 146). The variant provision in section 25 serves to indicate that section 19 is applicable to a case falling under section 12 (1) where there is no pending suit but the agreement to refer has been filed in Court, and the Court is invested with power thereof or make orders of reference on the basis of such agreement. (*Abdul Halim* v. *Chairman*, 1949 Lah. 278).

*Proviso*.—**When Court can supersede arbitration.**—*See* comment under section 19.

**Appeal and Revision.**—An order superseding an arbitration appealable under section 39 (1) (i).

There is no rule of law except section 151 of the Code of Civil Procedure which can authorise a Court to revise its own order superseding a reference to arbitration. (*Salli Singh* v. *Mullo Singh*, 138 I. C. 524 ; A. I. R. 1932 All. 656).

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## CHAPTER V

### General

**26. Application of Chapter.**—Save as otherwise provided in this Act, the provisions of this Chapter shall apply to all arbitrations.

### Comment

**Scope of the section.**—All that section 26 provides is that the provisions of Chapter V of the Arbitration Act, 1940 shall apply to all arbitrations which are governed by the Act. Section 29 does not mean that the Act applies to parole agreement to refer dispute to arbitration or that it applies to arbitration not governed by the Act as well. (*Gauri* v. *Ramlochan*, A. I. R. 1948 Pat. 430 ; 29 P. L. T. 105 ; 3 D. L. R. (Pat.) 26).

Chapter V contains the general provisions relating to all arbitrations, *i. e.*, arbitration without intervention of a court or arbitration in suit or arbitration with the intervention of a court where there is no suit pending. (*Bajrang* v. *Agarwal*, A. I. R. 1950 Cal. 267).

**27. Power of arbitrators to make an interim award.—**

(1) Unless a different intention appears in the arbitration agreement, the arbitrators or umpire may, if they think fit, make an interim award.

(2) All references in this Act to an award shall include references to an interim award made under sub-section (1).

## Comment

**Object of the power.**—This section confers upon the arbitrators the power to make an interim award. Before the enactment of section 27, an arbitrator or umpire had no power, unless authorised by the submission or subsequent agreement of the parties, to make an interim award. In many cases it was thought desirable that he should be able to do and in some cases one of the parties might not be willing to give him such authority, *e. g.*, where one party clearly owes the other large sum but there is a dispute as to some matter in their dealings. An interim award would be also very useful in order to deal with liability and with a postponement of the enquiry into damages. (Extract from the Report of the Committee).

**Unless a different intention appears.**—Section 27 empowers an arbitrator or umpire, unless the arbitration agreement expresses a contrary intention, to make an interim award. Therefore where it appears from the agreement that the disputes between the parties are to be decided by one and a complete and final award, the arbitrators cannot make an interim award. If, however, there is no such provision in the arbitration agreement the arbitrator or the umpire has the right to make interim or provisional awards. There is no rule of law that a partial award is invalid, but that question has to be decided on the intention of the parties, the matter being a subject of contract between them.

**Interim award.**—This interim award may well be final as to some of the claims referred, although it is perhaps more usual for some award merely to determine certain of the issues arising upon a claim, for instance, to determine the issue of liability while leaving questions of amount to be dealt with later. (*Russell*, 15th Ed., P. 208). In *Ratha Krishna Murte* v. *Chengalraya*, A. I. R. 1948 Mad. 365 ; (1948) 1 M. L. J. 164, the arbitration related to five contracts between the buyer and seller of various quantities of corn. The arbitrators agreed regarding two contracts and they disagreed with regard to the three remaining contracts. The arbitrators made two awards, first upon the two contracts they agreed and secondly, res-

pecting the three contracts upon which they disagreed. As regards the latter they referred the matters for decision of the umpire. These were held to be interim awards and provision was made in the bye-law for such awards as such and such awards were held to be valid.

Ordinarily an interim award is intended to be effective during the pendency of the arbitration, till the final award is given. It will cease to have effect after the final award is given. The object of permitting the arbitrator to pass interim awards seems to be to enable the parties to be placed in a position of security during the pendency of the arbitration proceedings. The interim awards are not intended to be operative as final awards. The arbitrator is empowered to give interim relief to parties so that any delay in the making of the award may not cause any harassment or inconvenience to the parties. Section 27 makes provision only for interim arrangement and does not expressly empower the arbitrator to pass successive or partial awards. However, the wording of sub-section (2) of section 27 lends support to the view that an interim award need not technically be interim award. It may include an interim arrangement with respect to a part of the claim or dispute which may, to the extent of that part of the dispute, be a final decision betweed the parties. Such a contingency may arise in partition suits. It is competent to the arbitrator to make a division of some properties by an interim award and then deal with the other properties in the final award. In the making of the final award, the fact of the interim award will have to be taken into consideration. All the procedure laid down in the case of a final award will apply in the case of an interim award also.

**28. Power to Court only to enlarge time for making award.**—(1) The court may, if it thinks fit, whether the time for making the award has expired or not and whether the award has been made or not, enlarge from time to time the time for making the award.

(2) Any provision in an arbitration agreement whereby the arbitrators or umpire may, except with the consent of all the parties to the agreement, enlarge the time for making the award, shall be void and of no effect.

**Comment**

Under sub-section (1) the power rests in all cases in the Court

only who may extend the time for making the award whether the time has expired or not or whether the award has actually been made or not. An examination of the language of section 28 clearly indicates that extension of time can be made even after the award has been filed. Section 28 has general application and as such applies both to references made through Court or outside the Court. Schedule I, r. 3 of the Arbitration Act has to be read with section 28 of the Act. (*Bhagwan Din Gupta* v. *Bisheshwar Nath*, 1958 A. L. J. 307).

**"The Court may".**—Under sub-section (1), the Court may, at its discretion, enlarge the period for the delivery of an award of arbitration without the consent of, and even if opposed by, the parties. (*Govind* v. *Ramkishan*, 2 W. R. 297). If an arbitrator makes an award beyond time, the delay may be condoned at any time by the Court in a proper case, for this sub-section gives power to the Court to extend time even after the award has been made. (*Nani Bala* v. *Ram Gopal*, A.I. R. 1945 Cal. 19). Sub-section (1)is very wide and confers full discretion on the Court to enlarge time for making award at any time. The Court can exercise that power [even after the award] has been made and filed, during the hearing of the petition under sections 14 and 17 and after the parties have led their evidence on merits. (*Narsing Das* v. *Bisan Dayal*, A. I. R. 1954 Orissa 29 : *Amar Nath* v. *Uggar Sen*, A. I. R. 1949 All. 399; *Ram Nath* v. *Nanjee*, A. I. R. 1953 Cal. 787 and *Radha Krishna* v. *Madho Krishna*, A. I. R. 1952 All. 856 ; 1952 A. L. J. 407).

Order for extension of time under this section does not amount to fresh submission, where agreement is illegal and order of reference upon such agreement is illegal. (*Nandkishore* v. *International Mercantile Corporation*, A. I. R. 1953 Cal. 415). The Court can exercise the power of extension of time *suo motu*. (A.I.R. 1954 Orissa 29). An award given by an arbitrator after the time limited by the arbitration agreement or by order of the Court for making the award has expired, is vitiated. (*Ariff* v. *Bengal Silk*, A. I. R. 1949 Cal. 350).

It is not competent to the Court to delegate to the arbitrators its own function of control as to time. (*Rabindra* v. *Jogendra*, A. I. R. 1923 Cal. 410). But such delegation is permissible with the consent of the parties. In such cases the arbitrator can only extend the time before the time originally fixed for making the award has expired. If he does not do so, he is by efflux of time *functus officio* and has no further jurisdiction in the matter. (*Cooperative Hindustan Bank* v. *Bhola Nath*, 31 I. C. 597 ; 19 C. W. N. 165). The power vested in the Court is permissive and discretionary, but it does not negative the right to extend the time by agreement impliedly

agreed to and acquiesced in between the parties to the arbitration proceedings. (*Fatti Kumari* v. *Upendra*, 50 I. C. 52 ; 4 P. L. J. 265).

Where arbitrator applies for extension of time, the Court must take into consideration all the circumstances of the case and decide if the arbitrator should be granted such extension. (*Moharram* v. *Mayadas*, 78 I. C. 521 ; *Anand* v. *Ram*, 1933 Pat. 565). The Court should not unreasonably make haste in rejecting the *application for time* where the arbitrator is not in collusion with either party or is not wilfully delaying or there is no bad faith in his conduct. (*Ram Kuar* v. *Multan Chand*, 8 I. C. 224 ; 29 P. L. R. 1908). Where a party contests the validity of an arbitration award on the ground that it was not completed within the time fixed by the Court, he must show that the delay arose from corruption or misconduct on the part of the arbitrator, or award was made after the issue of an order of Court superseding the arbitration and recalling the suit. (*Rasool Bibi* v. *Jan Ali*, 17 W. R. 31). An oral application for extension [of the period of submission] on the award by the arbitrator is valid. (*Sakal Chand* v. *Ambaram*, A. I. R. 1924 Bom. 380).

The Court has no doubt a discretion to extend time but it will do so only if cogent reasons are forthcoming. Obviously the discretion cannot be exercised in favour of a party who himself has been negligent and has been guilty of dilatory tactics. (*Oliver* v. *Mian Dost Mohd.*, A. I. R. 1935 Lah. 191). There is nothing in section 28 to suggest that the Court should not exercise this power to extend time unless it is expressly asked by a party to do so. (*Madura Mills* v. *Krishna Ayyar*, A. I. R. 1937 Mad. 405).

**Extension of time by mutual consent.**—An arbitrator is a domestic tribunal and the parties who refer their disputes to him for decision can, by mutual consent, which can be inferred from their conduct, acquiesce in the proceedings of the arbitrator who may submit his award beyond the date fixed by the Court for returning the same. Such a conduct can be inferred from the fact that the parties conducted the case and took a willing part in the proceedings before the arbitrator, though the date fixed for the filing of the award has expired. (*Asa* v. *Bhuban*, A. I. R. 1936 Lah. 466).

**Award made out of time.**—The facts in the case of *Patto Kumari* v. *Upendra Nath Ghosh*, A. I. R. 1919 Pat. 93 (Atkinson & Das, JJ.) : 4 Pat. L. J. 265, were that the parties agreed on 26-2-1918 to submit their differences in the suit to arbitration. The Court referred the dispute in accordance with law contained in the Second Schedule of the C. P. C. on the same date, and 25-3-1918 was fixed as the date within which the arbitrators should make their award. By another order of the Court, the time for making the award was

extended to 25-6-1918. The award, however, was not made within that time. It was actually made on 10-7-1918 and filed in the court on 12-7-1918. It was *held* that—

(a) There might be some force in the contention that, inasmuch as the arbitrators failed to make their award within time, the court had no jurisdiction or option under the rules of C. P. C. save and except to set aside the award which was made out of time, if the case stood alone on these facts.

(b) But there is a rule well recognized and established in the nature of an estoppel that, if the parties to an arbitration proceeding, by their conduct, lead the arbitrators to think and believe that, even though the time for making their award has in fact expired, the arbitrators should continue the proceedings and to which cause the parties must be deemed to have assented by acquiescing in taking part in such proceedings, then, though the time for making the award may have expired, the jurisdiction of the arbitrators would be deemed to continue to validate and give effect to the award.

**Meaning of "making the award".**—The expression *making the award* includes the pronouncement of the award and the award cannot be deemed to have been made till it is announced and one way of announcing it is by filing in Court. (*Harbhajan Singh* v. *Mewa Singh*, A. I. R. 1928 Lah. 753).

**Whether an award has been made or not.**—The fact that the award is already made, does not affect the power of the Court one way or the other. It is, however, a factor which ought to be taken into consideration for the purpose of determining whether or not application for enlargement of time should or should not be granted. (*Jethalal* v. *Amrit*, A. I. R. 1939 Cal. 260 ; *Russell*, 15th Ed., p. 218). The effect of the order of enlargement is that the extended time is to be treated as if it had been originally given in the arbitration agreement.

**Appeal.**—The Madras High Court has held that an appeal lies from an order refusing to extend the time for making award, for such order amounts to superseding the award. (*Martirosi* v. *Subramanyam*, A. I. R. 1928 Mad. 69 F. B.).

Sub-section (2) indicates that section 28 is applicable also to agreements made out of Court. (1958 A. L. J. 307). Sub-section (2) allows of provision being made in an arbitration agreement for enlargement of time for making the award where all the parties

consent to such enlargement. The provision in an arbitration agreement that the arbitrator is at liberty to extend the time for making his award by endorsement on the back of the agreement cannot be given effect to in view of the provision of the section. (*Barindra* v. *Bani*, 54 C. W. N. 796). In other words, a clause in the arbitration agreement empowering that arbitrator to extend time by making an endorsement is not sufficient.

In *Kuppuswami* v. *Anantharamier*, A. I. R. 1948 Mad. 40, an arbitration agreement provided that the arbitration would be completed within one month from its date subject to the extension of time not exceeding six weeks thereafter if all the arbitrators passed a resolution to that effect. The arbitrators passed an award after expiry of one month prescribed without any resolution by them extending the time for making the award.

The Madras High Court held that the award was invalid as it was made after the prescribed period without any resolution. Even assuming that such resolution extending the time was passed by them, there was no agreement by the parties consenting to such extension and therefore time could not be legally enlarged by reason of section 28 (2).

**29. Interest on awards.**—Where and in so far as an award is for the payment of money, the Court may in the decree order interest, from the date of the decree at such rate as the Court deems reasonable, to be paid on the principal sum as adjudged by the award and confirmed by the decree.

**Comment**

This section makes necessary provisions as to interest when the award makes no provision therefor. It has authorised the Court to allow reasonable rate of interest, where the award is for payment of money, not from the date of the award but from the date of the decree. The rate of interest from the date of the decree to the date of payment is in the discretion of the Court. Rate of interest is a matter to be decided on the facts of each case. Grant of interest is a matter within the discretion of the Court. Ordinarily 6 p. c. interest should be granted. (*A. I. R. 1933 Lah. 780*).

Where claim for interest was not a matter referred to arbitration and any of the parties pressed his claim for interest for the first time before the arbitrator, the award allowing interest is without jurisdiction. (*Union of India* v. *Prem Chand*, A. I. R. 1951 Pat. 201).

The expression "principal sum" means the amount originally advanced or the total amount including interest upto the date of the suit or award found due. As an award need not give details of the amount found due, the expression seems to refer to the amount decreed.

**30. Grounds for setting aside award.**—An award shall not be set aside except on one or more of the following grounds, namely :

(a) that an arbitrator or umpire has misconducted himself or the proceedings ;

(b) that an award has been made after the issue of an order by the Court superseding the arbitration or after arbitration proceedings have become invalid under section 35 ;

(c) that an award has been improperly procured or is otherwise invalid.

## Comment

**Scope and Object of the section.**—An arbitration award cannot be upset except on the specific grounds mentioned in section 30. If this is not done, the award cannot be avoided by raising a plea that it has become infructuous. (*Pertap* v. *Bechan*, 1940 R. D. 20 ; 1940 A. W. R. (B. R.) 16).

No court will review the arbitrator's conclusions or findings if he has acted within his authority and according to the principles of justice and behaved fairly to all parties, and where there is no legal misconduct. (*Dwarka Nath* v. *Kedar Nath*, 6 B. L. R. (Pat.) 56 ; A. I. R. 1951 Pat. 448). An arbitration, in substance, ousts the jurisdiction of the Court except for the purpose of controlling the arbitrators and preventing misconduct and for regulating the procedure after the award. So far as the hearing of the merits is concerned and the decision contained in the award, the Court has nothing to say, good, bad or indifferent. It has no right to review it or to consider it. (*Debidas* v. *Keshava*, A. I. R. 1945 All. 424).

In an application under section 30, the Court cannot make sifting investigation of proceedings before arbitrators, unless it is shown that the award is bad on the face of it. (*Gulzari Lal* v. *Busi*, A. I.R. 1953 Cal. 621). The Court should not set aside awards where

the parties have agreed to abide by the decision of a tribunal of their own selection, unless there has been something radically wrong and vicious in the proceedings. (*Harphool* v. *Prabhu*, A. I. R. 1950 E. P. 266 : 52 P. L. R. 128). It is not open to the Court to interfere with an award on the ground that the arbitrators were mistaken in awarding damages for breach of contract on a wrong basis, where the error does not appear on the face of the award. (*Tularam* v. *Bilasroy*, 85 C. L. J. 164). It is not necessary for the arbitrators to exhaustively give reasons for the conclusions arrived at by him or to give his findings on the issues raised in the case. His award will be a perfectly valid and good award, provided he has given a clear decision of the case. Where, on the face of it, the award is very vague and it is difficult to know what his findings actually are, the award is not a decision of the case at all. Further if the award does the very thing which the parties wished to avoid, namely, going to a court of law and bearing expenses of protracted litigation, the purported award defeats the very purpose of arbitration by throwing the parties back to the very position from which they wanted to escape. The defect in the award is a vital one and goes to the root of the award given by him and the award must, therefore, be treated as "*otherwise invalid*". (*Ishwar Dei* v. *Cheddu*, A. I. R. 1952 All. 802 : 1952 A. L. J. 403).

An award cannot be set aside on the ground that the decision of the Court possibly would have been otherwise. (*Ram Chand* v. *Atma Ram*, A. I. R. 1952 Ajmer 6).

Section 30 vests in the Court a discretion to set aside an award if misconduct on the part of the arbitrators is shown or if it is shown that the award was improperly procured, and it is not competent for the parties by agreement to oust this jurisdiction if they desire to enforce the award under the Act. (*Hurdwary* v. *Ahmed*, 1 I. C. 371; 13 C. W. N. 63; *Naraindas* v. *Kewalram*, 11 S. L. R. 43). But before setting an award aside, a court should make full enquiry into the objections raised against the award. (*Senuk* v. *Oree*, 2 N. W. P. 241). This section does not provide for the Court setting aside an award in part only. (*Mahomed* v. *Azim*, 1939 A. M. L. J. 15; but see *Badri* v. *Chamsa*, A. I. R. 1927 Pat. 183 ; 15 Pat. 579 ; 168 I. C. 115 where it was held that separable part if bad can be set aside).

The object of section 30 is to give finality to a decree passed in accordance with the decision of the arbitrator. If the party concerned fails to impeach the award before the Court making the reference or if his objection to the validity of the award is diallowed and a decree is passed in accordance therewith, the award becomes final and the decree passed upon it is not open to appeal or revision.

(*Rup Narain* v. *Nundroni*, 152 I. C. 90 ; 11 O. W. N. 1203; *Isribai* v. *Peribai*. 121 I. C. *164* : A. I. R. 1930 Sind 195 ; *Dacca Co-operative* v. *Dacca Co-operative*, A. I. R. 1938 Cal. 327).

**At whose instance award can be set aside.**—The court usually declines to set aside an award at the instance of a party who has not suffered any injury by the error. (*Narsingh Narain Singh* v. *Ajodhya Prasad Singh*, [1912] 15 Cal. L. J. 110 at p. 113 : 16 Cal. W.N. 256 ; *Union of India* v. *Jai Narain Misra*, A.I.R. 1970 S.C. 753).

*Clause (a)*

**Misconduct.**—An award can be set aside on the ground that an arbitrator or umpire has misconducted himself or the proceedings. The word "misconduct" as used with reference to arbitration does not necessarily or at all imply anything in the nature of fraud. It certainly may include cases where the arbitrator has failed to perform the essential duties which are cast upon him as an arbitrator as he is occupying a quasi-judicial position. The term "misconduct" has in the legal sense a wider significance than personal misbehaviour. The term "misconduct" simply means legal misconduct.

"Legal misconduct" means misconduct in the judicial sense of the word and not from a moral point of view and means some honest though erroneous breach of duty causing a miscarriage of justice. The word "misconduct" does not necessarily imply moral turpitude but it includes neglect of duties and responsibilities of the arbitrators and of what courts of justice expect from them before allowing finality to their awards.

It is difficult to give any exact definition of what amounts to misconduct on the part of the arbitrators. The expression appears to be of wide import because if, on the one hand, it does not necessarily bring or include misconduct of a fraudulent or improper character, it does include action on the part of the arbitrator which is on the face opposed to rational or reasonable principles that should govern the procedure. Misconduct is a question of fact in each case and has to be ascertained from the facts of the entire arbitration proceedings. The principle enunciated by the authorities is that when an arbitrator in arriving at the decision was influenced by secret enquiry of the case made by him after recording the evidence and by the opinion of third persons about the merits of the case, his conduct would amount to judicial misconduct. But the principle of law does not include the case where an arbitrator is selected because of his personal knowledge or where the parties who are *sui juris* agree to a reference that the arbitrator shall decide the dispute on his own knowledge or without evidence.

An arbitrator, though not bound by the technical web of judicial procedure and rules of evidence, must hear the parties and, if requested, their witnesses, unless he is absolved therefrom by the terms of the submission and must apply his mind to the points in dispute and decide it according to the ordinary rules of justice, equity and good conscience. The failure to hear the parties and their witnesses, unless absolved by the terms of the submission, amounts to misconduct on the part of the arbitrator. (Ma Hnine Le *v.* Ma Nyein Bwin, 162 I. C. 772 ; A. I. R. 1936 Rang. 191).

The following are some of the *instances* which amount to misconduct of the arbitrator or of the arbitration proceedings :

1. Legal misconduct ensues where the arbitrator's procedure is so irregular as to be opposed to the principles of natural justice.

2. A mishandling of the arbitration as is likely to amount to some substantial displacement of the ordinary rules of justice does amount to misconduct.

3. Failure to give a reasonable opportunity to a party of being heard amounts to misconduct on the part of an arbitrator. Such misconduct when there is no imputation of dishonesty is technical misconduct and not moral misconduct, and the Court can, in exercise of its discretion, remit the award to him for consideration.

4. The mistake as a matter of carelessness is so gross as to amount, though not in a moral point of view yet in a judicial sense of that word, to misconduct on the part of the arbitrator.

Change of previous intention by arbitrator before the award is made is not misconduct.

Where, in an arbitration under section 21 of the Arbitration Act, the arbitrator took statements from each of the parties in the absence of the other and made an award, the Supreme Court has held that it is one of the elementary principles of the administration of justice, whether by courts or by arbitration by lawyers or merchants, that a party should not be allowed to use any means whatsoever to influence the mind of the judge or arbitrator, which means are not known to and capable of being met and resisted by the other party. Therefore the arbitrator was guilty of legal misconduct and this was sufficient to vitiate the award, irrespective of the fact whether this misconduct had caused prejudice to any one. (*Payyavula Vengamma* v. *Payyavula Kesanna*, A. I. R. 1953 S. C. 21 ; (1953) (1) S. C. R. 119 ; 1953 A. L. J. 73).

The applicant and the two opposite parties were the sons of one Ajodhya, and Rajrani was the widow of Ajodhya. Ajodhya was

possessed of movable and immovable property which passed to his three sons and his widow on the death of Ajodhya. Shortly after the death of Ajodhya, however, disputes arose with regard to the joint property and the parties ultimately appointed one Mohan, an Advocate, who was a cousin of Ajodhya, as arbitrator, and an agreement was executed on 11-8-1940. Thereafter Mohan entered upon the reference and meetings were held from time to time, extending over several years, which were attended by the parties. No award was, however, made for quite a number of years till on 12-12-1949 a notice was served by the opposite party upon Mohan asking him not to proceed with the arbitration and intimating that he would not be bound by the award made thereafter. Mohan, however, proceeded with the writing of the award and made an award on 24-10-1950 which was duly registered in the office of the Sub-Registrar.

An application for filing the award was made on 17-4-51 and objections to the award were filed by the opposite party on 4-7-51. Before the reply to the objections was filed, an application for extension of time for making the award was made by the opposite parties. The Court extended the time, heard the objections and dismissed them. The award was then made a rule of the Court.

It has been held by the Allahabad High Court that it is not open to this Court to go into the grounds which were taken into consideration by the arbitrator in partitioning the property. It is always open to an arbitrator to compensate one party by awarding him compensation if he finds that immovable property can not be properly divided without inconvenience to them. If the arbitrator had the right to award compensation in lieu of property, his conduct cannot be said to be illegal nor does such a course of conduct amount to illegal misconduct. (*See Bhagwan Din Gupta* v. *Bisheshwar Nath*, 1958 A. L. J. 307).

**Setting aside of award made out of time.**—It was held by the Patna High Court that—

(a) Under the Arbitration Act, an award made beyond time can never be held to be invalid or void merely on this account.

The Court has power under Section 28 to extend the time even after the making of the award. The arbitrator has no such power, and even the parties in view of the provisions of law contained in section 28 (2), cannot confer such power on the arbitrator alone.

The parties, however, in a case of arbitration without the

intervention of the Court, have still got a right to enlarge the time for making the award by their fresh written agreement.

(b) Therefore, if—

(i) an award is made beyond the time fixed or extended by the court or by the parties ; and

(ii) inspite of the fact that one of the parties objected to the proceeding before the arbitrator going beyond the time fixed or took part in it under protest,

the award may be liable to be set aside under Section 30 under clause (a) on the ground that the arbitrator misconducted himself or the proceeding or under clause (c) of section 30 on the ground that the award is otherwise invalid. (*M/s. Bokaro & Ramgur Ltd.* v. *Dr. Prasun Kumar Banerjee*, A. I. R. 1968 Pat. 150 (F. B.) : I. L. R. 46 Pat. 1259 : 1968 B. L. J. R. 240).

*Clause (b)*

**Supersession of arbitration by court.**—*See* Comment under Section 19.

*Clause (c)*

**Scope** :—Section 30, clause (c) states that an award shall not be set aside except on the ground that an award has been improperly procured or is otherwise invalid. In other words, where an award has been improperly procured or is otherwise invalid, the award can be set aside.

**Award improperly procured.**—An award will be set aside if it is procured improperly. The expression "award improperly procured" has been adopted from section 14 of the Arbitration Act, 1899, in lieu of the expression "corruption, fraudulent concealment, wilfully misleading or deceiving the arbitrators or umpire." This change in the language is not material ; and corruption, fraudulent concealment, wilfully misleading and deceiving the arbitrators or umpire, if proved, will vitiate the award.

It has been held in the case *Shephard* v. *Brand*, (1734) 2 Barnard 463 that where the arbitrators take money from one side, although in payment of their charges and expenses, this is sufficient to set aside the award. In the case *In re Kenworthy and the Queen Insurance*, (1893) 9 T. L. R. 181, the above case was distinguished.

Treating the arbitrator may be a form of procurement or may amount to a mere indiscretion, and the Court will not, it would

seem, set aside the award on that ground unless either there was an intention to corrupt or influence the arbitrator or he was, in fact, corrupted or influenced. (*Russell*, 13th Edition, page 185). Sir G. Jessel, M. R., said in *Malmesbury Railway Co.* v. *Buddo*, 45 L. J. Ch. 271 that the Court has jurisdiction to set aside an arbitration on the ground of corruption subsequently proved.

It has been held by the Calcutta High Court that where arbitrators take money from one of the parties singly as fees for charges or anything else before making the award, this is sufficient cause to set aside the award. (*Akshoy Kumar Nandy* v. *S. C. Dass*, A. I. R. 1935 Cal. 359 : 38 C. W. N. 784 : 159 I. C. 165). In this case, it was observed :

"It is imperative that the arbitrators should always scrupulously avoid any course of action which even remotely bears the complexion of thus having put themselves into a position where it might be said against them that they had received a pecuniary inducement which might have had some effect on their determination of the matters admitted to their adjudication."

But where the arbitrators take money as fees from one of the parties and it is done by way of mutual arrangement between the contending parties, the award is not vitiated by reason of any misconduct on the part of the arbitrators. (*ibid*).

An award is improperly made when it is made by collusion or in consequence of a bribe. (*In re Whitley and Robert's Arbitration*, (1891) 1 Ch. 558).

An agreement between the parties to a building contract that the valuations, certificates, orders and awards of the architect shall be final and binding and shall not be set aside or attempted to be set aside on any insinuation of fraud, collusion or confederacy, is, in the absence of fraud on the part of either party, a valid agreement and not void as being against public policy. It is competent for the parties to agree that the question of fraud on the part of the arbitrator shall not be raised by either of them. (*Tullis* v. *Jacson*, (1892) 3 Ch. 441).

In the case *Printing and Numerical Registering Co.* v. *Sampson*, L. R. 19 Eq. 462 at p. 465, Sir G. Jessel, M. R. observed :

"If there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contract when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice. Therefore, you have this

paramount public policy to consider—that you are not lightly to interfere with this freedom of contract."

Fraud or dishonesty on the part of arbitrator is not sufficient to vitiate his award as a nullity. Such conduct amounts to misconduct and may afford good cause for a competent court to set aside the award. (*Khanchand* v. *Kadumal*, 15 I. C. 819 ; 5 S. L. R. 240).

In *Amarnath* v. *Eichholz*, A. I. R. 1932 Lah. 378 : 33 P. L. R. 365 : 137 I. C. 846, it has been held that the words "an arbitration has been improperly procured" include the case of an arbitrator who has been illegally and improperly appointed. The jurisdiction of the Court is not ousted by an arbitration clause in a written agreement. The position of the defendant after institution of the suit is that he can either sue for damages for breach of contract to refer or indirectly enforce specific performance of the contract by obtaining an order staying the proceedings under section 34. But he must not, after suit and before stay of proceedings, attempt to oust the jurisdiction of the Court by appointing arbitrators. If he does so and an award is made, he would be guilty of improperly obtaining an award within the meaning of section 30 of the Arbitration Act, 1940. (*Sawyer* v. *Louis Dreyfus*, 20 I. C. 504 ; 7 S. L. R. 1). Where an agreement for reference to arbitration is impeached in a suit, an injunction may be issued to stay arbitration proceedings. Where an injunction is issued to restrain arbitrators from proceeding, their award, if they ignored the injunction, will be considered to have been procured improperly. (*Macdonald* v. *George D'Emden*, 4 S. L. R. 187 ; 9 I. C. 707).

One of the parties to an arbitration agreement is entitled to apply to have the award set aside (or not enforced) on the ground that it had been improperly procured on account of want of jurisdiction in the arbitrators. (*People's Bank* v. *Kanahaya Lal*, A. I. R. 1935 Lah. 602 ; 16 Lah. 1000). Where the parties to the reference clothe the arbitrators with authority to make one award concerning all of them and they act within the four corners of that authority, it is not open to some of the parties to contend that the arbitrators have misconducted themselves in making one award. In such a case, neither the arbitration nor the award is improperly procured (*Dattaram* v. *Harjimal*, A. I. R. 1930 Sind 170 ; 121 I. C. 161 ; 24 S. L. R. 145). An application under section 30 of the Arbitration Act is not maintainable on the ground that there was no valid reference or no reference at all and consequently the arbitrators had no jurisdiction to make the award. The proper application to make in such a case will be an application under Sec. 33. The award in such a case cannot be said to be "otherwise invalid" or "improperly procured". (*Shah & Co.* v. *Ishwar Singh*,

A. I. R. 1954 Cal. 164). According to this Calcutta view, the question as to whether or not the arbitrators who made the award had any authority to proceed with the arbitration cannot be gone into in an application under Sec. 30 and the award cannot be set aside on that ground.

**Or otherwise invalid.**—An award made otherwise than in accordance with the authority conferred on the arbitrators is an award which is "otherwise invalid" and may accordingly be set aside by the Court. (*Ram Pratap* v. *Durga Prasad*, 92 I. C. 633 ; A. I. R. 1925 P. C. 293 ; 24 A. L. J. 13 ; 53 I. A. 1). The grounds of invalidity of an award contemplated in clause (c) of Sec. 30 refer to matters which apparently go to the root of the award and matters which merely pertain to procedure and have not been agitated before the arbitrator are covered by it. (*Sardar Singh* v. *Nawal Kishore*, 40 P.L.R. 972 ; A.I.R. 1938 Lah. 604). Section 30 (c) is wide enough to cover an award which is sought tobe challenged on the ground that the subject-matter of the reference was not capable of being referred to arbitration. (*Musafir* v. *Mohammad Roysul*, A. I. R. 1950 Assam 114). In the case *Penn Kondu* v. *Balasubramania*, A. I. R. 1949 Mad. 559, Mack, J. observed :

"No hard and fast rule can be laid down as to the type of cases in which an award may be remitted under section 16 (c) or set aside under section 30 (c)."

The expression in clause (c) of section 30 "or is otherwise invalid" is not *ejusdem generis*. It extends the jurisdiction of the Court to set aside an award on grounds other than those mentioned in clauses (a), (b) and (c) of Sec. 30. (*Savkur* v. *Amrit Lal*, A. I. R. 1954 Bom. 293). So the expression "otherwise invalid" should not be read *ejusdem generis* with the grounds given in the preceding clauses but is wide enough to embrace all grounds of attack regarding the validity of an award. (*Arjuna* v. *Nakula Chowdhury*, A. I. R. 1953 Orissa 75 ; 19 Cutt. L. T. 135).

**Instances of "otherwise invalid".**—An award which does not decide all matters in dispute is invalid and cannot be filed and enforced. (*Gaja Sinha* v. *Suraj Ali*, I. L. R. (1951) Hyd. 887 ; A. I. R. 1952 Hyd. 46).

Where some of the properties included in arbitration was filed by a person *benami* for the joint family and the division of the arbitrators required that person to make a conveyance in favour of all the parties in the reference, the mere fact that a person was not a party in the reference did not vitiate the award. (*Ramtaran* v. *Adhar*, 91 C. L. J. 287 ; A. I. R. 1953 Cal. 646).

In preliminary decree in a partition suit, the defendant was not made liable for general accounting but only for money traced into his hands and not spent for family purpose. Reference was made to arbitrators subsequent to the decree. Final award directed the defendant to pay on account of mismanagement. The interim award contained finding of mismanagement signed by the defendant. It was held that the final award did not contravene findings of Court in preliminary decree. It was further held that the defendants consented to award and cannot challenge it. (*Chidambaran* v. *Subramanian*, A.I.R. 1953 Mad. 492; ; (1952) 2 M. L. J. 524). In a dispute relating to partition of joint family property, the arbitrators appointed to effect division made defendants liable for taxes until accounts were taken and directed the defendants to execute indemnity bond in respect of liability. It was held that the arbitrator did not exceed his authority. (*ibid*). The arbitrator dismissed the entire claim of the plaintiff although the defendant admitted before him a part of the claim. It was held that the award could not be set aside. The mistake was due to inadvertence and was made honestly. There was nothing to infer misconduct on the part of the arbitrator. (*Rajnarain Misra* v. *Union of India*, 91 C. L. J. 145). Where arbitrators awarded damages for breach of contract considering several facts of the case, award cannot be set aside on the ground that *prima facie* the damages violated certain principles. (*Gulzarilal* v. *Bust*, A. I. R. 1953 Cal. 621).

**Objection as to validity of reference.**—There was a conflict of judicial opinion on this subject. The Calcutta High Court in the case *Durga Charan* v *Debendra Nath*, A. I. R. 1931 Cal. 109 : 34 C. W. N. 813 : 130 I. C. 137 held that the ground of objection which challenges the validity of the order of reference is no ground which may be put forward under paragraph 15 of the Second Schedule. Mitter, J. observed in this case :

"An examination of clause (c), sub-para 1 of para 15 will show that the words, "or being otherwise invalid" must refer to invalidity of the kind referred to in preceding sentences of the said clause, as for instance, of the award having been made after the issue of an order by the Court superseding the arbitration and proceeding with the suit or after the expiration of the period allowed by the Court. It has been pointed out by Sir Lancelot Sanderson, J., that all the grounds for setting aside the award mentioned in para 15 show that the Act contemplates in the first instance a valid reference. (*Duli Chand* v. *Mamuji Musaji*, 41 I. C. 295)."

In the Calcutta case *Golnur Bibi v. Abdul Samad*, A. I. R. 1931 Cal. 211 : 52 C. L. J. 298 : 130 I. C. 209 : 58 Cal. 628, Mukherjee, J. observed :

"The matter upon which I must fully concur with my learned brother, Mitter, J. is the meaning that he has placed upon the expression 'or being otherwise invalid' in clause (c), sub-para 1, para 15. He has held that the words must refer to invalidity of the kind referrred to in the preceding sentences of the said clause.....When the provision begins with the restrictive words 'but no award shall be set aside except on one of the following grounds' to hold that the words 'or being otherwise invaiid' may let in any ground of invalidity, in my judgment would be entirely wrong. I would, therefore, respectfully dissent from such decisions as have taken a contrary view. A ground of objecuon which challenges the validity of the reference, is not a ground which may be put forward when under para 15 the Court is asked to set aside the award ; the objections to be taken at the stage are objections to the proceedings as were had before the arbitrators. I am of opinion that the Legislature has deliberately restricted para 15 in this way, leaving to the parties to challenge the reference, which is an order of the Court and not act of the arbitrator, by appropriate proceedings. It is true that those proceedings are not specifically defined in the Code, but the fact that no appeal is allowed from the decree by no means suggests that there are no other means available to an aggrieved party to get the order of reference quashed. Two such means may at once be pointed out by way of an application for review or by way of revision."

But the decisions of the Allahabad, Lahore, Rangoon and Bombay High Courts and other Courts have taken contrary view. They have held that the words "otherwise invalid" in para 15, clause (1), sub-clause (c), Schedule II, Civil Procedure Code, include invalidity of one kind.

In Sind in the case *Kishan Chand* v. *Takhitram*, A. I. R. 1939 Sind 241 ; 183 I. C. 724 ; I. L. R. (1940) Kar. 22 (FB), the question referred to the Full Bench was whether it is open to the trial court in considering objections to an award under para 15 of the Schedule aforesaid to consider and decide objections raised as to the validity of the reference. In answering the question in the affirmative, Davis, Judicial Commissioner, observed :

"The applicant's case may be summarized in the argument that the words 'or being otherwise invalid' must be construed on the principle of *ejusdem generis*, and the learned advocate relies strongly on the ruling of the Calcutta High Court in *Golnur Bibi* v. *Abdul Samad*, A. I. R. 1931 Cal. 211. Mr. Justice Mukherjee in that case was of opinion that the words 'or being otherwise invalid' must be construed *ejusdem generis*, and that this construction prevented the trial court from considering and deciding under para 15 the questions relating to the validity of the reference which were not questi-

ons which could be argued or considered under that paragraph. This judgment is not a very satisfactory judgment....."

In the Rangoon case, U *Sein Win* v. *Central Plumbing*, A. I. R. 1935 Rang. 94 ; 156 I. C. 414 ; 12 Rang. 675, Page, C. J., said at page 685 :

"In *Durga Charan Debnath* v. *Gangadhar Deb Nath*, A. I. R. 1931 Cal. 109 and in *Golnur Bibi* v. *Abdul Samad*, it was held that the words "or being otherwise invalid" in para 15 (1) (c) of Schedule 2 must be construed *ejusdem generis* with the two preceding grounds of invalidity set out in para 15 (1) (c). I am not confident, however, that it could be held that these two grounds form a genus.....To my mind it is clear beyond doubt or controversy that the legislature by inserting the words in that para intended and provided that every ground upon which the validity of the award in law could be challenged should fall within the ambit of para 15 (1) of Schedule 2 and could be relied on as a ground for setting aside the award."

In *Rala Ram Walaiti Ram* v. *Bansi Lal Jagannath*, A. I. R. 1932 Lah. 239 ; 136 I. C. 11, Shadi Lal, C. J. said :

"The doctrine of *ejusdem generis* cannot, in my opinion, be invoked to restrict the full and natural meaning of the phrase 'or being otherwise invalid'. Ordinarily, a general word receives its natural meaning, but general word which follows particular and specific words of the same nature as itself, may take its meaning from them and may be presumed to be restricted to the same genus as those words. It is, however, clear that this rule of construction is used only for the purpose of ascertaining the intention of the legislature and, as observed by *Maxwell* in his book *Interpretation of Statutes*, Edition 7 at p. 288, the restricted meaning which primarily attaches to the general word in such circumstances is rejected when there are adequate grounds to show that it has not been used in the limited order of ideas to which its predecessor belong. If it can be seen from a wider inspection of the scope of the legislation that the general words, notwithstanding that they follow particular words, are nevertheless to be construed generally, effect must be given to the intention of the legislature as gathered from the larger survey."

So the words 'or otherwise invalid' are comprehensive enough to include all kinds of objection including one regarding the validity of reference. (*Madho Ram* v. *Sita Ram*, A. I. R. 1939 Lah. 69 ; 183 I. C. 79).

The Allahabad High Court has expressed conflicting opinions

as to whether the words 'being otherwise invalid' should be construed *ejusdem generis* In *Kanahayu* v. *Jagannath*, A. I. R. 1921 All. 16 and *Harichand* v. *Indra*, A. I. R. 1934 All. 95, the Allahabad High Court has held that an objection to the validity of reference was not an objection within the terms of para 15 of the Second Schedule.

But in a Full Bench decision *Mariam* v. *Amina*, A. I. R. 1937 All. 65 ; 167 I. C. 99 ; 1936 A. L. J. 1333 (F. B.), the Allahabad High Court has taken a contrary view and the majority of the Judges held that an objection to the validity of the reference to arbitration on the ground that the reference was illegal (because of the absence of leave) falls within the purview of para 15, schedule 2, Civil Procedure Code. In this case Iqbal Ahmad, J., observed :

"I cannot assent to the proposition that the words 'or being otherwise invalid' in clause (c) of para 15 do not refer to the invalidity of the kind referred to in preceding sentences of the said clause and embrace an objection which challenges the validity of the order of reference itself.....In any case it appears fairly clear to me that those words have reference to the invalidity of the award itself as distinct from some invalidity attaching to the Procedure of the Court."

This minority view of Sir Iqbal Ahmad, J., has been approved by their Lordships of the Privy Council in the case *Chhabba Lal* v. *Kallu*, 73 I. A. 52 ; 223 I. C. 567 ; 1946 A. L. J. 254 ; A. I. R. 1946 P .C. 72. The Privy Council pointed out in this case that an award on a reference made in a suit presupposes a valid reference on which an award has been made and if there is no valid reference, the purported award is a nullity and can be challenged in any appropriate proceeding (say, in a proceeding under section 33).

So all the previous decisions on para 15 (c) of Schedule II of the Civil Procedure Code in contravention of the interpretation given by Iqbal Ahmad, J., in A. I. R. 1937 All. 65 (F.B.) have been overruled by the Privy Council in A. I. R. 1946 P. C. 72.

The High Court of Assam has held that the phrase 'otherwise invalid' includes all kinds of invalidity. According to it, section 30 (c) is wide enough to cover an award which is sought to be challenged on the ground that the subject-matter of the reference was not capable of being referred to arbitration. (*Musafir* v. *Md. Roysul*, A. I. R. 1950 Assam 114). The Bombay High Court has also held that the phrase in para 15, clause (1), sub-clause (c), Schedule II, Code of Civil Procedure, includes invalidity of any kind. (*Sarkur* v. *Amrit*, A. I. R. 1954 Bom. 293).

According to the Madras High Court, an award that is invalid under the law governing minors, as where it is passed on a reference out of court without the minor being duly represented, comes within the expression 'or otherwise invalid' in para 15 (c) of Schedule II, and the Court can, for that reason, set aside the award. (*Lakshmi Narayan* v. *Ramchandra*, 45 I. C. 763 ; 34 M. L. J. 71).

According to the Patna High Court, paras 14 and 15 of the Second Schedule of the Code enable the Court to which an award is submitted to reference to give effect to the award if, in its opinion, it is either void or invalid or illegal. (*Radhey Lal* v. *Kanhai Lal*, 18 Pat. 193 ; A. I. R. 1939 Pat. 526).

The Calcutta High Court has recently held in *Shah & Co.* v. *Ishwar Singh*, A. I. R. 1954 Cal. 164 that an application under section 30 of the Arbitration Act, 1940 is not maintainable on the ground that there was no valid reference or no reference at all and consequently the arbitrators had no jurisdiction to make the award. The proper application in such a case is an application under section 33. The award in such a case cannot be said to be 'otherwise invalid' or 'improperly procured.'

It should be remembered that para 15 of the Schedule II of the Code corresponds to section 30 of the Indian Arbitration Act.

**Perversity as a ground for setting aside award.**—In a suit for partition, the story of the plaintff and one of the defendants was that there was only a partial partition before and the property in dispute remained a joint family property. The other defendant claimed that there had been a complete partition and the property in dispute was his self-acquired property and that there was nothing to show that the arbitrators have personal knowledge of the matter and even if they had, the arbitration agreement did not authorise them to make an award on their personal knowledge. It was held that it was open to them, on consideration of the evidence before them, to accept either the story of the plaintiff and the defendant or that of a complete partition as pleaded by the other defendant, and their award was not liable to be set aside on the ground of the award being perverse. (*Tika Ram* v. *Hans Raj*, I. L. R. (1954) Nag. 589 ; A. I. R. 1954 Nag. 241).

**Error of law apparent on face of award.**—It is well settled that an award of an arbitrator, being a decision of a domestic tribunal chosen by the parties, is binding upon them and cannot be set aside unless it suffers from an error of law apparent on the face of it.

It was stated by the Privy Council in the case of *Champsey Bhara & Co.* v. *Jivraj Balloo Spinning & Weaving Co. Ltd.*, A. I. R. 1923 P. C. 66 : 50 I. A. 324, that an error in law on the face of the award means that you can find in the award, or in the document actually incorporated thereto, as, for instance, a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and which, you can say, is erroneous. (*See* also *Alopi Prashad & Sons Ltd.* v. *Union of India*, A. I. R. 1960 S. C. 588 : (1960) 2 S. C. R. 793).

The award of the arbitrator is ordinarily final and conclusive, unless a contrary intention is disclosed by the agreement. The award is the decision of a domestic tribunal chosen by the parties, and the civil courts which are entrusted with the power to facilitate arbitration and to effectuate the awards, cannot exercise appellate powers over the decision (wrong or right). The decision is binding if it is reached fairly after giving adequate opportunity to the parties to place their grievances in the manner provided by the arbitration agreement. But it is firmly established that an award is bad on the ground of error of law on the face of it when, in the award itself or in a document actually incorporated in it, there is found some legal proposition which is the basis of the award and which is erroneous. (*Union of India* v. *Rallia Ram*, A. I. R. 1963 S. C. 1685 : (1964) 3 S.C. R. 164 ; *State of Jammu and Kashmir* v. *M/s. Teerath Ram Ahuja Private Ltd.*, A. I. R. 1971 J. & K. 97).

The Court cannot review the award and correct any mistake in the adjudication, unless objection to legality of award is apparent on the face of it. When—

(a) the arbitrator has given no reason for award ; or

(b) there is no legal proposition as basis of the award,

the contention that there are errors of law on the face of the award, must be rejected. (*Firm Madan Lal Roshan Lal* v. *Hukum Chond Mills Ltd., Indore*, A. I. R. 1967 S. C. 1030 : (1967) 1 S. C. R. 105).

In order that the rule that an award is not open to question even on the ground of an error of law apparent on the face of it, should apply, it must be clear that the question of law was the point at issue and both sides specifically agreed to refer it for the decision of the arbitrator. The rule will not apply where the parties make incidental submissions about a point of law in the pleadings and arguments in support of it. (*Thawardas Phirumal* v. *Union of India*, A. I. R. 1955 S. C. 468 : (1955) 2 S. C. R. 48 ; *State of Jammu & Kashmir* v. *M/s. Teerath Ram Ahuja Private Ltd.*, A. I. R. 1971 J. & K. 97).

The rule is that as the parties choose their own arbitrator to be the Judge in the dispute between them, they cannot, when the award is good on the face of it, object to the decision either upon the law or the facts. Therefore, even when an arbitrator commits a mistake either in law or in fact in determining the matters referred to him, but such mistake does not appear on the face of the award or in a document appended to, or incorporated in, it so as to form part of it, the award will neither be remitted nor set aside notwithstanding the mistake. (*M/s. Allen Berry & Co. Private Ltd.* v. *Union of India*, A. I. R. 1971 S.C. 696).

**31. Jurisdiction.**—(1) Subject to the provisions of this Act, an award may be filed in any Court having jurisdiction in the matter to which the reference relates.

(2) Notwithstanding anything contained in any other law for the time being in force and save as otherwise provided in this Act, all questions regarding the validity, effect or existence of an award or an arbitration agreement between the parties to the agreement or persons claiming under them shall be decided by the Court in which the award under the agreement has been, or may be, filed, and by no other Court.

(3) All applications regarding the conduct of arbitration proceedings or otherwise arising out of such proceedings shall be made to the Court where the award has been, or may be, filed, and to no other Court.

(4) Notwithstanding anything contained elsewhere in this Act or in any other law for the time being in force, where in any reference any application under this Act has been made in a Court competent to entertain it, that Court alone shall have jurisdiction over the arbitration proceedings and all subsequent applications arising out of that reference and the arbitration proceedings shall be made in that Court and in no other Court.

**Comment**

**Scope of the section.**—Sub-section (1) relates to the question as to where a completed award has to be filed, and prescribes the

local jurisdiction for that purpose. It determines the jurisdiction of the Court in which an award can be filed, while sub-sections (2), (3) and (4) are intended to make that jurisdiction effective in the following three different ways :—

1. by vesting in one Court the authority to deal with all questions regarding the validity, effect or existence of an award or an arbitration agreement ;

2. by casting on the persons concerned the obligation to file all applications regarding the conduct of arbitration proceedings or otherwise arising out of such proceedings in one Court ; and

3. by vesting exclusive jurisdiction in the Court in which the first application relating to the matter is filed.

Sub-section (2) deals with the ambit of the exercise of the jurisdiction mentioned in sub-section (1), and declares it to be exclusive by saying that "all questions regarding.....and by no other Court."

*Sub-section (1)*

**Scope.**—Sub-section (1) of Sec. 31 states that subject to the provisions of the Arbitration Act, an award may be filed in any Court having jurisdiction in the matter to which the reference relates. This sub-section relates to the question as to where a completed award has to be filed and prescribes the local jurisdiction for this purpose. It determines the jurisdiction of the Court in which an award may be filed.

Where a reference has been made by a Court under Sec. 21 or where an agreement has been filed in a Court under Sec. 20, the award is required to be filed in the Court. In case of arbitration without the intervention of the Court, an award may be filed in any Court having jurisdiction in the matter to which the reference relates.

*Court* means a civil court having jurisdiction to decide the question forming the subject-matter of the reference if the same had been the subject-matter of a suit, but does not, except for the purpose of arbitration proceedings under section 21, include a Small Cause Court. (Sec. 2 (c)). So a Court has jurisdiction to entertain an application to file an award or to enforce it as a decree only if it has jurisdiction to entertain a suit the subject of which is the subject-matter submitted to arbitration. (*In re Sri Krishna Khanna*, A. I. R. 1934 Sind 29). In *Venkatasaminiappa* v. *Srinidhi*, 1950 M. W. N. 320 ; (1950) I M. L. J. 709, Horwill, J. observed :

"If we have regard to section 31 (1) to ascertain in which Court, as the word is defined in Sec. 2, the award has to be filed, we find that it is the Court that has jurisdiction over the subject-matter of the award, the omission of any reference to residence being presumably for the reason that in filing an award there is no plaintiff and defendant."

In order to determine which is the Court having jurisdiction in the matter, we should first of all ascertain what the questions are, which form the subject-matter of the reference to arbitration. We should then proceed to ask : Supposing these questions had arisen in a suit, which is the Court which has jurisdiction to entertain the suit? That Court will be the Court having jurisdiction under the Arbitration Act also.

The Court which has jurisdiction will not be the Court at the place in which the agreement was entered into or the defendant resides, but the Court which will have jurisdiction in respect of the questions forming the subject-matter of the reference. ((1950) 1 M. L. J. 709). The question of residence will become relevant only if it arises out of or in connection with the subject-matter of the dispute and the reference. (*ibid.* ; *Bachubhai* v. *Mohanlal*, A. I. R. 1953 Sau. 163).

The words "Court having jurisdiction in the matter to which the reference relates" in sub-section (1) do not mean that the Court must have jurisdiction over the whole of the matter to which the reference relates and the question whether the Court has jurisdiction over the matter to which the reference relates or not should be decided in accordance with the general provisions in the Code of Civil Procedure.

If a suit to enforce the award lies, then the application for the award to be filed will also lie and there will be no difficulty in a case where the property is situated in different parts of India. (*Yeshwant Rao* v. *Dattatrya*, A. I. R. 1940 Nag. 191). In this case, the Court observed : "It is clear that the Khandwa Court in British India can have no jurisdiction at all over property situated in the Gwalior State. As regards property situated in another district in British India, it is clear that jurisdiction can be exercised in suits in view of the provisions of section 17 of the Civil Procedure Code, and the same applies to property situated in another province as is impliedly decided in *Nisar Ali* v. *Muhammad Ali*, A. I. R. 1932 P. C. 172."

So where the property is situate within the jurisdiction of two or more Courts, the award may be filed in any one of those Courts. (*Venkata* v. *Suryanaryana*, A. I. R. 1941 Mad. 129 and

*Lethanand* v. *Mira Bai*, A. I. R. 1942 Sind 79). The selection of forum is given to the applicant who wants to file the award.

Where all the immovable property dealt with by the award is within the jurisdiction of the Court and so also the parties to the award, the mere fact that the business which is one of the subject-matter of the award is carried on by the parties at a place not within the jurisdiction of the Court, is not sufficient to oust the jurisdiction to entertain an applicatton. (*Vishindas* v. *Tejumal*, A. I. R. 1938 Sind 59).

An agreement was entered into Amritsar between the defendant who resided at Amritsar, and plaintiffs who carried on business at Karachi. The defendant agreed to sell to the plaintiffs a certain quantity of grain not ascertained at the time. It was stipulated that the defendant would despatch the goods from Amritsar to the plaintiff, consigning them at his own risk, in the name of plaintiffs' branch at Amritsar to the plaintiffs' firm at Karachi. It was also stipulated that the defendant would receive 90 per cent. of the contract price as an advance in exchange for railway receipts. But the goods would be examined and weighed and rejected or accepted after arrival at Karachi and the balance, if any, due would be paid after the plaintiffs had reported on the goods.

It was held that as the goods were unascertained at the time of the agreement to sell, the sale could not be completed until the buyers had passed and accepted the goods at Karachi and that therefore the performance of the contract was to be completed at Karachi. Consequently, the Karachi Court had jurisdiction to entertain an application to file an award relating to disputes arising out of the agreement. (*Louis Dreyfus* v. *Daulatram*, 4 I. C. 147).

*Sub-section (2)*

**Scope and principle.**—The principle is that in the case of every arbitration, one Court and the only Court should be the forum in which all questions relating to the validity of the award should be finally determined. This sub-section makes the jurisdiction under sub-section (1) effective by vesting in one Court the authority to deal with all questions regarding the validity, effect or existence of an award or an arbitration agreement.

This sub-section provides that the Court where the award has been filed or may be filed, and no other Court, shall decide all questions regarding the validity, effect or existence of an award or arbitration agreement between the parties to the agreement or persons claiming under them. In other words, all such questions must be decided by the Court having jurisdiction in the matter to

which the reference relates. It is often probable in an arbitration outside the Court that two courts might conceivably have jurisdiction and jurisdiction is given to one of those courts at the choice of one or other of the parties by providing that the award may be filed in any court having jurisdiction. As long as no award has been filed, either court might have jurisdiction but as soon as it is filed in a court that court is the only court which has jurisdiction to decide such questions. (*Bengal Silk Mill* v. *Aisha Ariff*, A. I. R. 1947 Cal. 106).

An application raising a question as to the validity, effect or existence of an arbitration agreement is maintainable in the Court where the award may be filed, even though the award has not been actually filed at the date of the application. Further, the defect, if any, due to non-filing of the award at the date of the application can be cured by the filing thereof before the disposal of the application, and the Court may direct that the award be filed *nunc protunc*. (*Ariff* v. *Bengal Silk*, A. I. R. 1949 Cal. 350).

*Sub-section (3)*

**Scope.**—Sub-section (3) is intended to provide that all applications regarding the conduct of arbitration proceedings or otherwise arising out of such proceedings are to be made only in one Court and lays on the concerned party the obligation to do so.

This sub-section makes the jurisdiction under sub-section (1) effective by casting on the persons concerned the obligation to file all applications regarding the conduct of arbitration proceedings or otherwise arising out of such proceedings in one Court.

Sub-section (3) must be read in conjunction with sub-section (2) of sec. 31.

The respondent who was a party to an award, filed an application before the Subordinate Judge of Gauhati under section 14 (2) of the Indian Arbitration Act on 10th August, 1949, praying that the umpire may be directed to file the award in the Court. Upon this, notice was issued to the umpire to file the award in Court before 24th August, 1949. As the original award has been handed over to the parties, the umpire sent by post on 18th August, 1949 a copy of the award signed by him. The Court directed the respondent to file the original award in Court and he did so on 3rd September, 1949. Meanwhile the appellant's solicitors sent to the Registrar of the Calcutta High Court (Original Side) on 17th August, 1949 the original award for being filed in Court and the award was filed on 29th August, 1949.

The Supreme Court held that as the umpire had, on the direction of the Subordinate Judge of Gauhati, sent a copy of the award signed by him to the Court on 18th August, 1949, the earlier filing for the purposes of section 31 (3) of the Arbitration Act was in the Gauhati Court and not in the Calcutta High Court, though the original award was filed by the respondent in the Gauhati Court only after the appellant's solicitor had sent the award for filing to the Calcutta High Court. In the circumstances, the Gauhati Court alone had jurisdiction to proceed with the hearing of the dispute under section 31 of the Act. (*Kumbha Mavji* v. *Union of India*, [ 1953 ] S. C. R. 878 ; A. I. R. 1953 S. C. 313 ; 8 D. L. R. (S. C.) 359).

*Sub-section (4).*—The object of sub-section (4) apparently is to go further than sub-section (3), that is, not merely casting on the party concerned an obligation to file all applications in the Court but vesting exclusive jurisdiction for such applications in the Court in which the first application has been already made.

This sub-section is not meant to be confined to applications made during the pendency of an arbitration. The necessity for clothing a single Court with effective and exclusive jurisdiction and to bring about the avoidance of conflict and scramble is equally essential whether the question arises during the pendency of the arbitration or after the arbitration is completed or before the arbitration is commenced.

The proposition "in" is used in various contexts and is capable of conveying various shades of meaning. In the Oxford English Dictionary, one of the shades of meaning of this proposition is—

"Expressing reference or relating to something ; in reference or regard to ; in the case of, in the matter, affair or province of.

"Used especially with the sphere or department in relation or reference to which an attribute or quality is predicated."

The phrase "in any reference" used in sub-section (4) means "in the matter of a reference". The word "reference" having been defined in the Act as "reference to arbitration", the phrase "in a reference" means "in the matter of a reference to arbitration". Therefore the phrase "in a reference" in sub-section (4) is comprehensive enough to cover an application first made after the arbitration is completed and a final award made, and this sub-section vests exclusive jurisdiction in the Court in which an application for filing an award has been first made under section 14. (*Kumbha Mavji* v. *Union of India*, A. I. R. 1953 S. C. 313 ; 1954 S. C. A. 366 ; 1953 S. C. J. 436).

**32. Bar to suits contesting arbitration agreement or award.**—Notwithstanding any law for the time being in force, no suit shall lie on any ground whatsoever for a decision upon the existence, effect or validity of an arbitration agreement or award, nor shall any arbitration agreement or award be set aside, amended, modified or in any way affected otherwise than as provided in this Act.

## Comment

Sections 32 and 33 provide that an arbitration agreement or award shall be contested only by application and not by suit. This proposal was made by the Civil Justice Committee and is in consonance with the general principle that the law of arbitration should provide simple, speedy and cheap settlement of difference.

**Scope and object of the section.**—The object of the Legislature in enacting section 32 is that no suit should be allowed to be instituted for a decision upon the existence, effect and the validity of an award and no party to an award shall be allowed to have it set aside, amended or modified or in any way affected. The scheme of this section is to prevent the parties to an arbitration agitating question relating to the arbitration in any manner other than that provided by the Indian Arbitration Act. So a suit where any question may be raised with regard to the existence and validity of an award, is expressly barred by this section.

Section 30 of the Specific Relief Act does not override the provisions of this section 32 of the Arbitration Act which applies "notwithstanding any law for the time being in force". The governing section is, therefore, this section. (*Mool Chand* v. *Rashid*, A. I. R. 1946 Mad. 346).

A valid award operates to merge and extinguish all claims embraced in the submission and, after it has been made, the submission and award furnish the only basis by which the rights of the parties can be determined and constitute a bar to any action on the original demand. (*Latufulla* v. *Muhammad*, A. I. R. 1946 Sind 117).

An award is binding between the parties in all the matters which it professes to decide. The fact that the parties to the award have not carried out its terms is not in law sufficient to deprive the award of its binding effect. (*Deoki Nandan Dalmia* v. *Basant Lal Ghanshyam Das*, A. I. R. 1941 Cal. 527).

The first part of this section prevents a substantial right to challenge the existence of an arbitration agreement, and the second part of this section prevents the setting aside, amending or modifying or in any way affecting an arbitration agreement otherwise than as provided by this Act. (*Bajrang Lal* v. *Agarwal*, A. I. R. 1950 Cal. 267). The second part is in very wide terms and where the effect of decreeing a partition suit will be to set aside an award, this section will be a bar to such a suit. (*Lachhuman* v. *Makar Singh*, A. I. R. 1954 Pat. 27).

Where the defendant who is relying upon an award as a bar to the plaintiff's suit did not take the steps to have it filed and dealt with under the appropriate provisions of this Act, it is not competent to him to rely upon it in answer to the action. That he might be entitled to do so if the award happened to be acted upon by the parties and is the part of it which had to be performed by the defendant was actually performed. (*Venkatasubbarayya* v. *Bapadu*, (1950) 2 M. L. J. 627).

A suit to enforce an award in which the defendant denies the existence and validity of the award, is barred by this Section. (*Ram Chandra* v. *Munshi*, A. I. R. 1950 Pat. 48).

This section must be read with the next section (*i.e.*, section 33) and the two sections read together mean that where a person admits having entered into an arbitration agreement but contends that it is not operative, section 32 applies and bars any suit by such a person to challenge the existence, etc., of the arbitration agreement, and his only remedy is to apply under section 33. (*Maniklal* v. *Shiva Jute Bailing Ltd.*, 52 C. W. N. 389). Section 32 is concluded in very general terms and deals with all sorts of applications including applications not only under section 33 by way of challenging the existence or validity of an agreement of arbitration or an award, but also applications which may be made by a party to have an arbitration agreement confirmed or declared as subsisting between the parties. It is, therefore, open to a party who is thwarted in his attempt to have the disputes settled by the process of arbitration if there is an arbitration agreement between the parties, to come to the Court and have the question of the existence, etc. of the arbitration agreement adjudicated upon by the Court, so that, on such adjudication had by him from the Court, he can proceed further with the arbitration proceedings as contemplated by the arbitration agreement. He is entitled to apply to the Court for a declaration that there is a subsisting contract between the parties and that the respondent is bound to have all the disputes in connection with it decided by the arbitrators as contemplated in the arbitration agreement, which is disputed by the respondent. The mere fact

that it is open to the applicant to file a substantive suit on the original cause of action, would not deprive him of his right to have the question of the existence or validity of the arbitration agreement decided upon by the Court by taking proceedings under Section 32. He is not bound to pursue his remedy by suit merely because the other party denies the existence or dispute the validity of the arbitration agreement. (*Vishambhar Lal* v. *Gulamally*, 4 D. L. R. (Bom.) 9).

Sections 32 and 33 have a very limited application, namely, where the existence or validity of an *arbitration agreement* (and not the contract containing the arbitration agreement) is challenged. These sections do not hit a suit which challenges the validity of a contract, though it contains an arbitration clause, Therefore a suit for a declaration that a contract containing an arbitration clause was never entered into or that it was void *ab initio* or had become void, is maintainable and is not impliedly barred by section 32 or 33. These sections do not, by necessary implication, repeal section 9 of the Civil Procedure Code and section 39 of the Specific Relief Act. (*State of Bombay* v. *Adamjee Haji*, A.I.R. 1951 Cal. 147).

Section 32 does not apply to a case where no relief is sought in respect of an agreement of reference to arbitration or award. If in a suit the plaintiff challenges either the existence or the validity of the contract, one of the terms whereof is that any dispute between the parties relating to the execution of that contract must be decided by reference to arbitration, the suit cannot be said to offend against the provision of this section. (*Banwari Lal* v. *Board*, A. I. R. 1949 East Punjab 165). It has been held that even if an application for setting aside an award under section 30 is barred by limitation, an application for a declaration that the award is invalid and illegal as there was no valid reference, is maintainable under this section and there is no period of limitation prescribed for the making of such an application. (*Ruby General Insurance* v. *Pearey Lal*, A. I. R. 1951 Punjab 440).

**Existence.**—In *Manicklal* v. *Shiv Jute Baling Ltd.*, 52 C. W. N. 389, it has been held by Mr. Das, J., that the word "existence" in both the sections 32 and 33 means legal existence as opposed to merely factual or apparent existence. Where, however, the arbitration agreement is denied in the sense that the person never entered into it, there is, in fact and in law no arbitration agreement in existence at any time, and a suit by such a person is not hit by section 32.

But in *Chaturbhuj* v. *Mohan Lal*, 53 C. W. N. 410, it has been held that the word "existence" should not be read in a restricted sense but in its ordinary and natural meaning, namely, existence

either in fact or in law. An application by a party who denies the factum of the arbitration agreement is, therefore, maintainable under section 33.

**Effect of arbitration agreement or award.**—The words "effect of the award" are wide enough to cover a suit to enforce an award. Although the party may not in terms ask for a decision of the Court to give effect to the award, the fact that he asks the Court to enforce the award must result in the Court giving a decision upon its effect and, therefore, such a suit is not maintainable. (*Narbada Bai* v. *Natvarlal*, 55 Bom. L. R. 408 ; A. I. R. 1953 Bom. 386).

**33. Arbitration agreement or award to be contested by application.**—Any party to an arbitration agreement or any person claiming under him desiring to challenge the existence or validity of an arbitration agreement or an award or to have the effect of either determined shall apply to the Court and the Court shall decide the question on affidavits :

Provided that where the Court deems it just and expedient, it may set down the application for hearing on other evidence also and it may pass such orders for the discovery of any particulars as it may do in a suit.

**Comment**

**Object of the section.**—The object of this section is to provide a speedy remedy to a party objecting to a reference or an award, and instead of having to file a separate suit for the purpose, he can merely move an application which has to be generally on affidavits. (*Balwant Singh* v. *Ram Charan*, A. I. R. 1944 All. 188 : 1944 A L. J. 241). The object is to provide a remedy to a party who challenges the agreement to obtain for his own benefit from the Court a substantial determination about non-existence of the agreement, irrespective of the fact that the other side wishes to enforce or not (*Bhagwan* v. *Atma Singh*, A. I. R. 1945 Bom. 494) with a view to save the trouble and expense of having to file a separate suit for that purpose. (*United India Fire & General Insurance* v. *Bhagat Singh*, A. I. R. 1954 Punjab 171).

**Nature of Proceedings under the section.**—Where an application under section 33 is filed challenging the existence of validity of an award, the procedure laid down in sections 14, 15 and

16 is not made immediately applicable. Proceedings under this section are entirely different from the proceedings under sections 14 to 17 of the Act and the Court is not bound to pronounce a judgment in accordance with the award merely because it is dismissing the application under this section filed by the other side specially when it has not been moved to pass any such order by the respondent. Under this section the validity of an award can only be contested by an application to the Court and not by independent suit. This section is mandatory. (*Bajrang Lal* v. *Agarwal*, A. I. R. 1950 Cal. 267).

**Scope and applicability of the section.**—The award was filed in the Court on 18th July, 1951. An application under section 33 for challenging the validity of the arbitration agreement was presented on 17th January, 1952. An application under section 30 for setting aside of the award was also presented on 12th December, 1952. Thus the petitioner took advantages of both the remedies available to him under the law for challenging the validity of the award. The application under section 30 was held by the Court to be barred by time. The application under section 33 was dismissed on the short ground that only one application lay for securing a declaration that the award was invalid.

It was held by the High Court that where the Court proceeded to dismiss the application under section 30 on the ground that the application was time-barred, it was incumbent upon the Court to pronounce upon the application under section 33 and to decide whether the arbitration agreement, and consequently the award which was given in pursuance of that agreement, was or was not invalid. If after hearing the parties, the Court came to the conclusion that the award was not invalid, it was perfectly justified in pronouncing judgment according to the award. The action taken by the Court in not proceeding to consider the objection of the petitioner in regard to the validity of the award, was contrary to the express provision of the law. (*United India* v. *Bhagat Singh*, A. I. R. 1954 Punj. 177).

Normally in dealing with an application under this section, the Court is concerned with determining the existence, legality or effect of an arbitration agreement at the instance of a party challenging the arbitration agreement. It is not concerned with the existence or validity of the transactions which are the subject-matter of arbitration. The latter question, i.e., as to the existence or validity of the subject-matter of dispute cannot fall directly within the scope of the inquiry as to the existence or validity of the arbitration agreement. But where a party applying under section 33 desires to have the effect of the arbitration agreement determined, the Court is entitled under section 33 to consider whether the particular

dispute before the Court is within the scope of the arbitration agreement. If the Court comes to the conclusion that a dispute is within the agreement the arbitrator is the sole judge of it but if it does not fall within the scope of the arbitration agreement, the Court is entitled to declare the effect of the arbitration agreement and incidentally upon the validity of the contract.

If the Court, on an application under section 33, holds that an arbitration agreement does, in fact, exist or that it is a valid agreement, as it is open to it to so hold in view of sections 32 and 33, the arbitrator is entitled to proceed to decide the dispute on the merits. It cannot be held that once an objection to the existence or legality of an arbitration agreement is taken, the arbitrator loses jurisdiction to decide the dispute on merits for all time. Nor is it necessary for the party asserting that an arbitration agreement exists in fact and law to make a substantive application for a declaration to that effect when the other party has challenged the existence or validity of the arbitration agreement and has failed therein. (*Gordhandas* v. *Natvar Lal*, A. I. R. 1952 Bom. 349).

A suit to challange the existence or validity of an arbitration clause in a contract or for determining the effect of an arbitration agreement or award is not maintainable by reason of this section which provides that such a challenge must be made by means of an application and not by means of a suit. (*Bajrang Lal* v. *Agarwal*, A. I. R. 1950 Cal. 267).

Sections 30 and 33 are not co-extensive. Section 33 deals with both agreements and awards while section 30 deals with award only. Again, section 33 covers question as to the existence or the validity or the effect of the award but section 30 has no concern with the question of existence or effect of the award. Application of various kinds can be conceived which may concern the existence or effect of award and which cannot possibly be application under section 30. The ambit of section 33 is undoubtedly wider. The validity of an award may be challenged under section 15 or under section 16 or under section 30. But none of these sections provides for making of an application. It is perfectly clear that the authority for making an application in each of these cases is derived ultimately from the general provision contained in section 33. There is nothing in the language of sections 30 and 33 to suggest that the invalidity contemplated by the two sections are mutually exclusive. But the matter does not rest on the use of the word "validity" and "invalid" in the two sections alone. A stronger reason is furnished by the scope and effect of sections 31, 32 and 33 which are interlinked. (*Per* Chakerverty, J., in *Shah & Co.* v. *Isher Singh*, 6 C. W. N. 471 ; A. I. R. 1956 Cal. 289 (F.B.) ).

The appellant company insured a car belonging to respondent

No. 1 and issued a policy of motor insurance which contained, *inter alia*, the following terms :—

"All differences arising out of this policy shall be referred to the decision of an arbitrator to be appointed by the parties..... If the company shall disclaim liability to the insured for any claim hereunder and such claim shall not, within 12 calendar months from the date of such disclaimer have been referred to arbitration, then the claim shall have been deemed to have been abandoned and shall not be recoverable."

The car was lost, and the company through its Branch Manager disclaimed liability on three different dates. The insured did not take any action in regard to the appointment of an arbitrator until more than twelve months after the last disclaimer by the company.

The case of the company was that the insured must be deemed to have abandoned his claim by virtue of the contract of insurance policy while the respondent averred that there was never any valid disclaimer by the company of its liability as the Branch Manager had no authority to disclaim the liability and it could have been disclaimed only by the resolution of the company.

The Company presented the application under section 33 of the Indian Arbitration Act praying for a declaration that the reference to arbitration was illegal and the award if made by the arbitrator would not bind the company. It was contended on its behalf that the arbitration clause had ceased to be operative and the question as to the existence and validity of the arbitration agreement was triable by the Court under section 33 and not by the arbitrator.

The Supreme Court held that—

(a) The point on which the parties were in dispute was a difference *arising out of the policy* because recourse to the contract by which both the parties were bound was necessary for the purpose of determining the matter in dispute between them as there was no contention raised in the present case by either of the parties that there was no contract entered into at all or that it was void *ab initio*, and therefore the arbitrator had jurisdiction to decide the matter referred to him. The contention that the arbitration agreement has ceased to be applicable or that it no longer subsists will not oust the jurisdiction of the arbitrator.

(b) No question of determining the effect of the arbitration agreement within the meaning of section 33 arose because there was

no dispute between the parties as to what it meant. The real question between the parties is whether the first respondent has or has *not* complied with the conditions of the arbitration agreement, and this question does not turn on the effect of the agreement. (*Ruby General Insurance Co. Ltd.* v. *Pearey Lal Kumar and Another*, [1952] S. C. R. 501 ; A. I. R. 1952 S. C. 119 ; 54 P. L. R. 199).

**Who can apply under section 33.**—Any party to an arbitration agreement can apply. The words "any party to the arbitration agreement" should be read in a sense other than in the strict and literal sense. These words should be construed to mean a party who is alleged to be a party to the arbitration agreement but who challenges the existence thereof. An application by a party who denies the factum of the arbitration agreement is, therefore, maintainable under section 33. An application under this section by the joint Hindu family business is not maintainable. (*Chaturbhuj* v. *Bhicum*, 53 C. W. N. 410). The expression should be construed so as to cover a person who is claimed to be a party to an agreement of arbitration, although he does not admit its execution or the authority of the person executing it. (*Lalchand* v. *Basant Mal*, 49 P. L. R. 245).

Where an application challenging the existence of an award itself is presented to the Court under section 33, no award needs or can be filed with such application (*Kuppuswami* v. *Ananth*, A. I. R. 1948 Mad. 40) but when an application to set aside an award is made, it is not competent to file a petition for setting aside an award till the award has been filed. (*Ratanji* v. *Dhiraj Lal*, A. I. R. 1942 Bom. 101 ; *Lachhmi* v. *Gobardhan*, A. I. R. 1948 Pat. 171 and *Bengal Jute Mill* v. *Jiva Ram*, A. I. R. 1944 Cal. 304). If once the award is produced in Court even though it may not have been produced before the application was made, it will be deemed to have been made on an application to set aside the award, irrespective of the fact that notice has been received of filing of the award or not, such application is competent. (*Damari* v. *Rampirit*, A. I. R. 1950 Pat. 376).

An application under section 33 is governed by Art. 181 of the Indian Limitation Act and the period of limitation runs from the date when the right to apply for challenging the existence or the validity of an arbitration agreement arises. (*Shah & Co.* v. *Ishar Singh*, A. I. R. 1954 Cal. 164).

Ordinarily, the Court should decide the questions on affidavits. But where such questions cannot be conveniently tried by affidavits, the Court is entitled to examine witnesses. (*Deokinandan Dalmia* v. *Basant Lal*, A. I. R. 1941 Cal. 527 and *Sheo Charan* v. *Sonichar*, A I.R. 1948 Pat. 207).

34. **Power to stay legal proceedings where there is an arbitration agreement.**—Where any party to an arbitration agreement or any person claiming under him commences any legal proceedings against any other party to the agreement or any person claiming under him in respect of any matter agreed to be referred, any party to such legal proceedings may, at any time before filing a written statement or taking any other steps in the proceedings, apply to the judicial authority before which the proceedings are pending to stay the proceedings; and if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, such authority may make an order staying the proceedings.

**Comment**

Section 34 of the Indian Arbitration Act is a virtual reproduction of section 4 of the English Arbitration Act of 1889.

**Scope and applicability of the section.**—From the language of section 34, it is quite clear that the legal proceeding which is sought to be stayed must be in respect of a matter which the parties have agreed to refer and which comes within the ambit of the arbitration agreement. Where, however, a suit is commenced as to a matter which lies outside the submission, the Court is bound to refuse a stay. In the words of Viscount Simon, L. C., in *Heyman* v. *Darwins, Ltd.*, [1942] A. C. 356, the answer to the question whether a dispute falls within an arbitration clause in a contract must depend on—

(a) what is the dispute; and

(b) what disputes the arbitration clause covers.

P placed certain orders with D for supply of sugar and paid some money as advance. D failed to supply sugar. It was alleged by D that there was an oral agreement between the parties that if there was any dispute between the parties it would be referred to arbitration. P brought a suit against D for refund of the amount

on the basis of an agreement between the parties by which the defendant agreed to supply sugar to the plaintiff. When summonses were received by the defendant, the defendant filed an application under section 34 of the Indian Arbitration Act for the stay of the proceeding on the ground that there had been an agreement for reference to arbitration.

According to section 2 (a) of the Arbitration Act, arbitration agreement means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not. The first essential ingredient of an arbitration agreement is that it should be in writing. Unless it is in writing, it cannot amount to an agreement to refer to arbitration.

As in this case there was no agreement at all in writing to refer the matter to arbitration, section 34 does not apply and therefore the application is liable to be dismissed. (See *M/s Sugar Dealers v. Sita Ram Sri Gopal* 1953 A. L. J. 521).

If the arbitration agreement is broad and comprehensive and embraces any dispute between the parties in respect of the agreement, or in respect of any provision in the agreement, or in respect of anything arising out of it, and one of the parties seeks to avoid the contract, the dispute is referable to arbitration if the avoidance of the contract arises out of the terms of the contract itself. Where, however, the party seeks to avoid the contract for reasons dehors it, the arbitration clause cannot be resorted to as it goes along with other terms of the contract. In other words, a party cannot rely on a term of the contract to repudiate it and still say that the arbitration clause should not apply.

Where, however, an arbitration clause is not so comprehensive and is not drafted in the broad language, namely, "in respect of" any agreement, or "in respect of something arising out of it" that proposition does not hold good. The arbitration clause is a written submission agreed to by the parties in a contract and like every written submission to arbitration must be considered according to its language and in the light of the circumstances in which it is made. (*Gaya Electric Supply Co. Ltd.* v. *State of Bihar*, [1953] S. C. R. 572; A. I. R. 1953 S. C. 182 ; (1953) 1 M. L. J. 605). The facts of this case are as follows :—

Disputes which arose between the State of Bihar and the Electric Supply Company whose licence had been revoked by the State, were settled by an agreement which provided that the State should make an advance payment of Rs. 5 lakhs to the Company, and the Company should hand over the undertaking to the State. The undertaking was to be valued within 3 months and, if any

money was found due to the Company as per the Government valuation over 5 lakhs, it will be paid to the Company and if the valuation was less than 5 lakhs, the Company would refund the excess received by it. The agreement contained an arbitration clause which ran as follows :

"In the case of any difference or dispute between the parties over the valuation as arrived at by the Government and that arrived at by the Company, any such difference or dispute including the claim for additional compensation of 20 per cent shall be referred to arbitration."

The Company instituted a suit against the State alleging that the State had failed to make its valuation and to make payment of the excess within the time fixed and as time was of the essence of the contract, it had rescinded the agreement, and praying for a declaration that the undertaking belonged to it, for damages and appointment of a receiver. The State applied under section 34 of the Arbitration Act for stay of the suit.

The Supreme Court *held* that the scope of the arbitration clause was very narrow, it conferred jurisdiction on the arbitrator only on the question of valuation of the undertaking pure and simple. Questions relating to the breach of contract or its rescission were outside the scope of the clause and the suit could not be stayed under section 34.

So if the suit sought to be stayed relates to a matter beyond the ambit of the arbitration agreement, the Court shall refuse stay.

**Requisite conditions for stay of legal proceedings.**—In order that a stay may be granted under section 34 of the Indian Arbitration Act, it is necessary that the following conditions should be fulfilled :—

(1) The proceeding must have been commenced by a party to an arbitration agreement against any other party to the agreement ;

(2) The legal proceeding which is sought to be stayed must be in respect of a matter agreed to be referred ;

(3) The applicant for stay must be a party to the legal proceeding and he must have taken no step in the proceeding after appearance.

It is also necessary that he should satisfy the Court not only that he is, but also was at the commencement of the proceedings,

ready and willing to do everything necessary for the proper conduct of the arbitration ; and

(4) The Court must be satisfied that there is no sufficient reason why the matter should not be referred to an arbitration in accordance with the arbitration agreement. (*Anderson Wright Ltd.* v. *Moran and Co.*, [1955] 1 S. C. R. 862 : A. I. R. 1955 S. C. 53 : 1955 Nag. L. J. 116).

The first and essential pre-requisite to making an order of stay under section 34 is that there is a binding arbitration agreement between the parties to the suit which is sought to be stayed. The question whether the dispute in the suit falls within the arbitration clause really pre-supposes that there is such agreement and involves consideration of two matters, *viz.*,—

1. What is the dispute in the suit ; and
2. What dispute the arbitration clause covers.

It is incumbent upon the Court, when invited to stay a suit under section 34, to decide first of all whether there is a binding agreement for arbitration between the parties. (*ibid*).

If it is held that the arbitration agreement and the contract containing it are between the parties to the suit, the dispute in the suit will be one relating to the rights and liabilities of the parties on the basis of the contract itself and will come within the purview of the arbitration clause worded as it is in the widest of terms. If, on the other hand, it is held that the plaintiff is not a party to the agreement the application for stay must necessarily be dismissed. (*ibid*).

Lord Porter pointed out in *Heyman* v. *Darwins*, [1942] A. C. 356 at p. 393 :

"This does not mean that in every instance in which it is claimed that the arbitrator has no jurisdiction the Court will refuse to stay an action. If this were the case such claim would always defeat an agreement to submit disputes to arbitration, at any rate until the question of jurisdiction had been decided. The Court to which an application for stay is made is put in possession of the facts and arguments and must in such a case make up its mind whether the arbitrator has jurisdiction or not as best as it can on the evidence before it. Indeed, the application for stay gives an opportunity for putting these and other considerations before the Court that it may determine whether the action shall be stayed or not."

The observations quoted above were approved by Mr. Justice S. R. Das in the case of *Khusiram* v. *Hanutmal*, (1948) 53 C. W. N. 505 at p. 518 and it was held by the learned judge that where on an application made under section 34 of the Arbitration Act for stay of a suit, an issue is raised as to the formation, existence or validity of the contract containing the arbitration clause, the Court is not bound to refuse a stay, but may, in its discretion, on the application for stay, decide the issue as to the existence or validity of the arbitration agreement even though it may involve incidentally a decision as to the validity or existence of the parent contract.

**Taking of**

**"any other steps in the proceedings"** :—The Arbitration Act does not define the word 'proceedings'.

The following *powers of the Court* to be exercised in a suit when necessary :—

(a) for the issue of a warrant for the arrest of the defendant ;

(b) for the issue of an order directing the defendant to furnish security ;

(c) for the grant of temporary injunction necessitated by the case, and
the punishment for its breach ;

(d) appointment of receiver ; and

(e) making of other interlocutory orders,

are *supplemental powers*. These proceedings which are supplemental to the suit or the proceedings in the nature of a suit, do not deal with the merits of the dispute between the parties but are intended merely for the protection of the parties, and they do not advance the progress of the suit.

On the other hand, the *incidental proceedings* are those which are necessary in the taking of the suit to its fruition, that is, its ultimate decision and making of a decree. (*Anand Kumar Parmanand Kejriwala* v. *Kamala Devi Hira Lal Kejriwala*, A. I. R. 1971 Bom. 231).

The requirement of section 34 of the Arbitration Act is that the party must make the application for stay before taking any step in the suit or proceeding.

The word 'proceedings' in section 34 means the suit, or the proceeding (in the nature of a suit) which relates to the dispute. (*Anand Kumar Parmanand Kejriwala* v. *Kamala Devi Hira Lal Kejriwala*, A. I. R. 1971 Bom. 231).

The case of *Zalinoff* v. *Hammond*, [1898] 2 Ch. 92 : 67 L. J. Ch. 370, arose out of an action for dissolution of partnership between the plaintiff and the defendant. On 22-3-1898, the plaintiff gave notice of motion for the appointment of a receiver and, in support, he filed the affidavits in which he made various allegations of misconduct against the defendant. The writ in the suit was issued on 16-3-1898, and the notice of motion was served on 22-3-1898. The defendant entered on appearance and filed affidavits in answer to the charges made against him by the plaintiff. On 16-4-1898, the plaintiff's notice of motion having stood over once or twice in the interval, the defendant gave notice of motion to refer all matters in difference between the parties to arbitration.

It was *held* that—

(a) Mere filing of affidavits in defence to a motion for a receiver is not in the nature of an application to the Court, and consequently, not a '*step in the proceedings*'.

(b) By such a step is meant a *substantive step* taken by a party, though it may be of a very limited application.

In the case of *Nuruddin Abdul Husein* v. *Abu Ahmed*, A. I. R. 1950 Bom. 127 : I. L. R. (1951) Bom. 357, Tendolkar, J., held that—

(a) The true *test* for determining whether an act is a step in the proceedings, is not so much the question as to whether it is an application (although, that would be a satisfactory test in many cases), but whether the act displays an unequivocal intention to proceed with the suit and to give up the right to have the matter disposed of by arbitration.

(b) The practice of filing *appearances under protest* is deprecated, and, whether or not the appearance is filed under protest, it ought not to make any difference.

The step in the proceedings must be such an application made by the party as to lead the Court to the conclusion that the party prefers to have his rights and liabilities determined by the Civil Court rather than by the domestic forum upon which the parties might have agreed. (*Jadavji Narsidas* v. *Hira Chand Chaturbhuj*, A. I. R. 1954 Bom. 174 (D. B.) : I. L. R. (1954) Bom. 348).

It is not, however, necessary that the application must be disposed of or decided before the defendant is disabled from asking for stay under section 34. (*Ibid*).

The application which must debar a defendant from moving to refer the case to arbitration, must be a *substantive application*. Substantive application means an application which expresses a desire to take step in the suit to indicate that the defendant proposes to go on with the suit. It must indicate that the defendants desire to abandon the agreement to refer the matter to arbitration and proceed with the suit. (*Anand Kumar Parmanand Kejriwala* v. *Kamala Devi Hira Lal Kejriwala*, A. I. R. 1971 Bom. 231 (D. B.) : I. L. R. (1971) Bom. 264 : 71 Bom. L. R. 801).

In the case of *Sansar Chand* v. *State of M. P.*, A. I. R. 1961 M. P. 322 (D. B.) : 1961 Jab. L. J. 525, the plaint was filed on August 5, 1959 and, on the plaintiff's application, an ex parte temporary injunction was issued on August 6, 1959, restraining the defendants from attaching the movable property except cash. The defendants filed their appearance on September 1, 1959. They were ready to file their reply to the application for temporary injunction but, as the plaintiff had amended the previous application for temporary injunction, the reply was filed later. In the reply, the arbitration clause was relied upon claiming that the Court had no jurisdiction to entertain the suit. The injunction matter was thereafter fixed for argument on September 19, 1959. On this date, the defendants asked for adjournment to argue the matter. The arguments were heard on September 22, 1959, and the Court rejected the application for temporary injunction on September 23, 1959.

On November 17, 1959, an application was made by the defendants under section 34 to stay the proceedings in the suit.

It was *held* by the Madhya Pradesh High Court that—

(a) Having regard to the provisions of section 41 read with Schedule II, it is no ground to refuse stay of the suit to a party merely because the defendants asked for vacating of the injunction issued by the Court *ex parte*.

(b) An interlocutory application (that is, for appointment of a receiver or for injunction) does not necessarily amount to a proceeding in suit.

In the case of *Subal Chandra* v. *Md. Ibrahim*, A. I. R. 1943 Cal. 484 : 47 Cal. W. N. 570, the suit was filed on 5-1-1943 by the plaintiff against his partners for a declaration that the partnership

stood dissolved on 22-4-1942 and for other ancillary reliefs including one for accounts and appointment of a receiver. On 7-1-43, the plaintiff obtained an *ex parte* order for appointment of a Receiver and for an injunction, and it was made returnable on 11-1-43. The motion was adjourned for 3 weeks with a direction that the affidavit in opposition to be filed within a fortnight and the reply by the plaintiff to be filed by the following Saturday. Interim order was to continue, and liberty was reserved to either parties to take inspection of the books and documents at the office of the S. D. O. on 2 days' notice to one another's solicitors.

On 22-1-43, one of the partners took out the notice for stay of the suit under Section 34. It was *held* by Das, J., that—

(a) The filing of the affidavit in opposition to the application for the appointment of Receiver and for leave to inspect documents cannot possibly be referable to any intention to go to arbitration or to any objection to the filing of the suit, but only indicates that the petitioner was anxious to oppose that application.

(b) If the defendants acquiesce in the making of a substantive order in the direction of proceeding further in the suit, for *inspection of documents*,' they disclose an intention to go on with the suit.

In the case of *Gannu Rao* v. *Thiagaraja Rao*, A. I. R. 1949 Mad. 582 : (1948) 2 M. L. J. 606, an interim appointment of receiver was made. The defendants appeared by an Advocate, and asked for 10 days' time for filing counter-affidavits. The time was granted. The injunction was modified by the consent of the plaintiff and the defendant's Advocate and stated that respondent No. 1 had been permitted to overdraw from the Bank the security of the fixed deposit, and the plaintiff's Advocate agreed that the fixed deposit may be used as security for future overdrafts and that the order of interim injunction would not be enforced to the prejudice of the respondent No. 1. The case was adjourned to 14-3-47. At no stage, it was indicated that the applicant contemplated the filing of an application for stay under section 34. On the adjourned date, the applicant stated for the first time that he intended to file an application for referring the dispute to arbitration. This was recorded, and an order was made to the Commissioner to initial certain books and documents which, the defendant No. 1 said, were received from the auditors. It was *held* that—

(a) If something is done by the party concerned which is in the *nature of an application to the court*, it necessarily comes in the category of a step in the proceedings.

(b) The word 'proceedings' in Section 34 is of general application and applies not only to the suit.

(c) Any interlocutory application in a suit would come in the category of 'proceedings'.

(d) As the defendant No. 1 has taken a step in those proceedings, the bar applies to him.

**Exercise of discretion of Court.**—The dispute relating to dissolution of a firm on the ground that it is just and equitable to do so, should be decided by the Court, and the Court should exercise its discretion in not staying the suit in spite of the arbitration clause. (*N. C. Padmanabhan* v. *S. Srinivasan*, A. I. R. 1967 Mad. 201 : 78 Mad. L. W. 681 ; *Sailendra Nath Kumar* v. *Chillar M. Ram*, I. L. R, (1951) 2 Cal. 140 ; *Ganesh Chandra Dey* v. *Kamal Kumar Agarwalla*, A. I. R. 1971 Cal. 317).

**35. Effect of legal proceedings on arbitration.**—(1) No reference nor award shall be rendered invalid by reason only of the commencement of legal proceedings upon the subject-matter of the reference, but when legal proceedings upon the whole of the subject-matter of the reference have been commenced between all the parties to the reference and a notice thereof has been given to the arbitrators or umpire, all further proceedings in a pending referene shall, unless a stay of proceedings is granted under section 34, be invalid.

(2) In this section the expression "parties to the reference" includes any persons claiming under any of the parties and litigating under the same title.

**Comment**

**Scope and object of the section.**—Section 35 relates to the effect of subsequent legal proceedings on a pending reference. Such preceedings will not affect the reference unless—

(a) they relate to the whole of the referred matter ; and

(b) all the parties to the reference are impleaded in the proceedings.

Where these conditions are fulfilled, the legal proceedings will nullify the arbitration proceedings on the expiry of the time within

which an application to stay the proceedings may be made or on the refusal of such an application.

This section speaks of the subject-matter of a legal proceeding in a Court and the subject of the reference before the arbitration. It is the identity of the two that attracts the operation of this section. But where the dispute between the parties which was the subject-matter of the arbitration agreement, is not canvassed in the legal proceeding started in a Court by one of the parties to the arbitration reference but only the alleged misconduct of the arbitrator, this section is not attracted and consequently the proceedings before the arbitrator will not be invalid. (*Gurumurthy* v. *Narasimha*, A. I. R. 1954 Orissa 234). The Court observed in this case that this section merely reproduces the principles laid down in the leading case *Doleman & Sons* v. *Ossett Corporation*, 81 L. J. K. B. 1092 ;(1912) 3 K. B. 257 ; 167 L. T. 581.

This well-known case of *Doleman* lays down that where an action has been commenced upon a contract containing a provision for reference to an arbitrator of any dispute arising under the contract and is pending, no application to stay the action having been made or such application having been refused, an award made by the arbitrator under the provision for reference upon the subject-matter of the action, subsequent to the commencement thereof and without the consent of the plaintiff, is invalid and will not afford a defence to the action. In other words, it lays down that an arbitrator has no authority to adjudicate upon a matter which has already been made the subject of an action unless the person bringing the action consents to the jurisdiction of the arbitrator. This proposition rests upon a sound principle and its validity cannot be challenged. It is, therefore, clear that when the same matter comes before two tribunals—a public tribunal appointed by the Government and a domestic *forum* chosen by the parties—and no order is made staying the proceedings before the one or the other, the public tribunal alone must decide that matter and cannot be hampered by any adjudication thereupon by the private tribunal. If the Court has refused to stay an action or if the defendant has abstained from asking it to do so, the Court has *seisin* of the dispute, and it is by its decision, and by its decision alone, that the rights of the parties are settled. It, therefore, follows that the private tribunal, if it has ever come into existence, is *funtus officio* unless the parties agree *de novo* that the dispute shall be tried by arbitration, as in the case where they agree that the action itself shall be referred. There cannot be two tribunals each with the jurisdiction to insist on deciding the rights of the parties and to compel them to accept its decision. The essence of the rule enunciated in Doleman's case is that the law does not permit the same question to be decided by a court of law as well as by the arbitrator, and it is

only when the dispute before the two tribunals is *identical* that a decision given by the arbitrator must be treated as *ultra vires*. In India the scope of this rule cannot be extended to this extent that when an action has been brought in respect of a contract containing an arbitration clause and has not been stayed, then an award made by the arbitrator upon a dispute coming within that clause is *ultra vires irrespective of the fact that that dispute was or was not a matter in controversy in the action.* The court of law and the arbitrator can go on simultaneously if the dispute before them, though relating to the same contract, are entirely different.

*Sub-section (1)*

**Scope.**—Commencement of legal proceedings by itself does not render any reference or award invalid. But the reference or award will be invalid if the following conditions are satisfied :—

1. If the subject-matter of the reference and of the legal proceedings is the same ;

2. If the parties to the reference are also the parties to the legal proceedings ;

3. If the notice of the legal proceedings has been given to the arbitrator or umpire ; and

4. If the stay of the proceedings has not been granted by the Court under section 34.

**By reason only of the commencement of the legal proceedings.**—The mere fact of a suit being filed does not invalidate the arbitration proceedings. (*Khilloo Ram* v. *Louis Dreyfus*, 52 I.C. 130 ; 13 S. L. R. 8).

The views of the Sind Court have been accepted in preference to the views of the Calcutta, Lahore, and Madras High Courts and have enacted that the legal proceedings will not affect the reference unless—

(*a*) they relate to the whole of the referred matter ;

(*b*) all the parties to the reference are impleaded in the proceedings ; and

(*c*) a notice of the proceedings has been given to the arbitrators or umpire.

The rule laid down in *Doleman's* case has been modified to this extent in section 35 of the Indian Arbitration Act.

(*a*) **Whole of the subject-matter of reference.**—The institution of a suit by one of the parties to a contract disputing the *factum* or validity of the contract containing a submission clause is no bar to the arbitrator's proceeding with the reference because the matters referred to the arbitrators are not the same as those which are the subject-matter of the action. In such a case, there is no encroachment by the arbitrators on the jurisdiction of the Court. (*Donald* v. *Basant Ram*, A. I. R. 1928 Sind 91).

(*c*) **Notice given to arbitrator or umpire.**—The authority delegated to an arbitrator cannot be revoked except by leave of the Court, and so long as it is not revoked, he has power to make an award and there would be no impropriety of conduct on his part in proceeding with the reference after the suit is filed, unless he has notice that there has been an application for leave to revoke the authority conferred on him to some Court competent to grant such leave. (*Dhanpat Mal* v. *Kishan Lal*, 35 I. C. 536 ; 10 S. L. R. 1).

A notice to one of two joint arbitrators is notice to both of them. (*All-India Groundnot Syndicate*, in re, 47 Bom. L. R. 420 ; A. I. R. 1945 Bom. 497). After notice, the arbitrator will not be entitled to proceed with the arbitration.

**Further proceedings in pending reference.**—An application to the Court for extension of time for making the award is not a proceeding in a pending reference and cannot be included in the expression "further proceeding in" a pending reference within the meaning of this sub-section. To merely apply to the Court for extension of time does not offend either against the letter or spirit of this section. (*In re* All-India Groundnut Syndicate, A. I. R. 1945 Bom. 497).

**Unless a stay of proceedings is granted.**—If the application for stay is refused by the Court in exercise of its discretion under section 34, the remedy by arbitration ceases to be available. If the suit is stayed, the arbitrators are free to bring their proceedings to a termination and make an award in accordance with law. (*Sarat Chandra* v. *Raj Kumar*, 69 I. C. 863 ; 35 C. L. J. 432 ; A. I. R. 1923 Cal. 135 ; *Jawahar Singh* v. *Fleming Shaw*, A. I. R. 1937 Law. 85).

**36. Power of Court where arbitration agreement is ordered not to apply to a particular difference, to order that a provision making an award a condition precedent to an action shall not apply to such difference.**—Where it is provided (whether in the arbitration agreement or otherwise) that an award under an arbitration agreement shall be a condition precedent to the bringing of

action with respect to any matter to which the agreement applies, the Court, if it orders (whether under this Act or any other law) that the agreement shall cease to have effect as regards any particular difference, may further order that the said provision shall also cease to have effect as regards that difference.

## Comment

**Scope and object of the section.**—An agreement may contain a clause that no legal proceedings shall be taken on a certain matter unless the metter has first been made the subject-matter of an award. Therefore Section 36 empowers the Court to overrule this provision when the award is set aside or otherwise becomes void. The object of the section is, according to Russell, to meet the doubt which existed prior to this Act as to whether the Court could grant auxiliary relief in case where the parties have agreed that no action shall be brought or proceedings taken until the arbitrator has made his award. It was arguable that the parties by deferring the jurisdiction of the Court until the event has happened, have deprived themselves of the right to invoke the powers of the Court until the event has happened.

An agreement which purports to oust the jurisdiction of the Court is, on the ground of public policy, illegal and void but an agreement that no right of action shall arise unless and until an award has been made is valid and enforceable. In policies of Insurance, building agreements and grain and other commercial contracts, it is commonly stipulated that in case of any dispute arising thereunder, such dispute shall be referred to arbitration or that the obtaining of an award shall be a condition precedent to the right to sue.

The principle underlying Section 36 is the same as underlies exceptions 1 and 2 to section 28 of the Indian Contract Act. Section 28 of the Contract Act applies to agreements which wholly or partially prohibit the parties from having recourse to a court of law. But where all that the parties agree to is that any dispute arising between them out of various contracts should be referred to arbitration as provided by certain rules and there is nothing in that agreement or in such rule which prohibits any of the parties from taking proceedings thereafter in a Court of justice, the agreement is valid. (*Gobunda* v. *Rameshwar*, A. I. R. 1937 All. 650 : 1937 A. L. J. 823).

In *Heymans* v. *Darwins Ltd.*, (1942) A. C. 366 at p. 377, Lord Wright observed :

"The contract, either instead of or along with a clause submitting differences or disputes to arbitration, may provide that there is no right of action save upon the award of an arbitrator. The parties in such a case make arbitration followed by an award a condition of any legal right of recovery on the contract. This is a condition of the contract to which the Court must give effect, unless the condition has been waived, *i. e.*, unless the party seeking to set it up has somehow disentitled himself to do so."

It follows that where a dispute is governed by such a condition, an action in respect of that dispute cannot succeed, and no purpose will be served by allowing it to continue. (*Dennehy* v. *Bellany*, (1938) 2 All E. R. 262 at p. 264).

Under section 36, it is first essential that the Court should order that the agreement shall cease to to have effect as regards the particular dispute, and upon making such order if the agreement contains a provision that an award under an arbitration agreement shall be a condition precedent to the bringing of an action in respect of any matter to which the agreement applies, may further order that the provision making an award a condition precedent to the bringing of an action shall also cease to have effect as regards that dispute. (*Russell*, 13th Ed., p. 455).

In the following cases, the Court may order that the arbitration agreement shall cease to have effect as regards any particular dispute :—

1. Under section 12 (2) (b), where the Court may under the circumstances mentioned in section 12, on the application of any party to the arbitration agreement, order that the arbitration agreement shall cease to have effect ;

2. Where the award remitted under section 16 (3) becomes void ;

3. Where an award has been set aside under section 30 ;

4. When the Court orders under section 33 that the arbitration is of no effect.

**37. Limitations.**—(1) All the provisions of the Indian Limitation Act, 1908, shall apply to arbitrations as they apply to proceedings in Court.

(2) Notwithstanding any term in an arbitration agreement to the effect that no cause of action shall

accrue in respect of any matter required by the agreement to be referred until an award is made under the agreement, a cause of action shall, for the purpose of limitation, be deemed to have accrued in respect of any such matter at the time when it would have accrued but for that term in the agreement.

(3) For the purposes of this section and of the Indian Limitation Act, 1908, an arbitration shall be deemed to be commenced when one party to the arbitration agreement serves on the other parties thereto a notice requiring the appointment of an arbitrator, or where the arbitration agreement provides that the reference shall be to a person named or designated in the agreement, requiring that the difference be submitted to the person so named or designated.

(4) Where the terms of an agreement to refer future differences to arbitration provide that any claims to which the agreement applies shall be barred unless notice to appoint an arbitrator is given or an arbitrator is appointed or some other step to commence arbitration preceedings is taken within a time fixed by the agreement and a difference arises to which the agreement applies, the Court, if it is of opinion that in the circumstances of the case undue hardship would otherwise be caused, and notwithstanding that the time so fixed has expired, may, on such terms, if any, as the justice of the case may require, extend the time for such period as it thinks proper.

(5) Where the Court orders that an award be set aside or orders, after the commencement of an arbitration, that the arbitration agreement shall cease to have effect with respect to the difference referred, the period between the commencement of the arbitration and the date of the order of the Court shall be excluded in computing the time prescribed by the Indian Limitation Act, 1908, for the commencement of the proceedings (including arbitration) with respect to the difference referred.

court has no jurisdiction to give a decree on the basis of an award. (*Keshri Mal* v. *Ganesh Das*, A. I. R. 1951 Ajmer 59). But where a suit is pending before a Small Cause Court, the Small Cause Court is the authority to whom application for stay under section 34 of the Arbitration Act has to be made, and such authority may pass an order staying the suit.

A Small Cause Court has jurisdiction to entertain a suit to enforce an award. (*Nanhe Lal* v. *Singhai*, A. I. R. 1944 Nag. 24).

**41. Procedure and powers of Court.**—Subject to the provisions of this Act and of rules made thereunder—

(a) the provisions of the Code of Civil Procedure, 1908, shall apply to all proceedings before the Court and to all appeals under this Act, and

(b) the Court shall have, for the purpose of, and in relation to, arbitration proceedings, the same power of making orders in respect of any of the matters set out in the Second Schedule as it has for the purpose of, and in relation to, any proceedings before the Court :

Provided that nothing in clause (b) shall be taken to prejudice any power which may be vested in an arbitrator or umpire for making orders with respect to any of such matters.

## Comment

**Scope of the Section.**—Section 41 confers generally the same powers as the Courts enjoy under the Civil Procedure Code and with the Schedule adds certain special powers in relation to arbitrations. This section relates to matters subsequent to an application to the Court to file an agreement. The proper interpretation of this section is that provisions as to notice under section 80, C. P. C., which section must be strictly construed, do not apply to the application to file an agreement in court under section 20 of the Arbitration Act. (*Ram Chand* v. *Governor-General-in-Council*, A. I. R. 1947 Sind 147). By the use of the words "subject to the provisions of this Act" in this section, the scope of this section is restricted to attracting the procedural rules of the C. P. C. to proceedings before the Court under the Arbitration Act. Under this section the Court can make an order for interim injunction, although

an arbitration proceeding is not actually pending under this section read with the fourth item in the Second Schedule.

**Subject to the provisions of this Act.**—The Civil Procedure Code applies only subject to the provisions of the Arbitration Act which include section 23 (2) and 32.

*Clause* (*b*)—The Court has jurisdiction to appoint a receiver in arbitration proceedings as soon as an application under section 20 of the Act is made, even though notice of the application has not been given to the parties concerned. (*Nagar Chand* v. *Surendra Nath*, A. I. R. 1946 Pat. 70).

42. **Service of notice by party or arbitrator.**—Any notice required by this Act to be served otherwise than through the Court by a party to an arbitration agreement or by an arbitrator or umpire shall be served in the manner provided in the arbitration agreement, or if there is no such provision, either—

(a) by delivering it to the person on whom it is to be served, or

(b) by sending it by post in a letter addressed to that person at his usual or last known place of abode or business in India and registered under Chapter VI of the Indian Post Office Act, 1898.

**Comment**

**Scope of the section.**—Section 42 of the Arbitration Act makes provision for the service of notices under the Arbitration Act between parties or between arbitrator and parties. It makes provision for service of notices without the intervention of a Court. Where notice is to be served through the intervention of the Court, the procedure laid down in Order V of the Code of Civil Procedure has to be followed. Where there is a procedure of serving notices given in the arbitration agreement, that procedure has to be followed.

43. **Power of Court to issue processes for appearance before arbitrator.**—(1) The court shall issue the same proeesses to the parties and witnesses whom the arbitrator or umpire desires to examine as the Court may issue in suits tried before it.

(2) Persons failing to attend in accordance with such process, or making any other default, or refusing to give their evidence, or guilty of any contempt to the arbitrator or umpire during the investigation of the reference, shall be subject to the like disadvantages, penalties and punishments by order of the Court on the representation of the arbitrator or umpire as they would incur for the like offences in suits tried before the Court.

(3) In this section the expression "processes" includes summonses and commissions for the examination of witnesses and summonses to produce documents.

**Comment**

*Sub-section* (1).—It requires the Court to assist the arbitrator to enforce the production of evidence empowering the Court to punish default or contempt before the arbitrators as if it were committed before the Court.

*Sub-section* (2).—The words "refusing to give their evidence" in this sub-section refer to the case of a person who refuses to give evidence when placed on oath and is required to answer questions put to him, and not to a case where a person elects not to produce any evidence in the case. (*Janan* v. *Narain*, 8 A. L. J. 929 ; 11 I. C. 259).

Where a defendant does not appear before the arbitrators to whom the dispute has been referred for arbitration and the arbitrator makes an award, the Court cannot pass a decree on the basis of such award without issuing notice to the defendant and the failure to issue such notice is fatal to the decree. (*Thakur Singh* v. *Kardhai*, 1935 A. L. J. 986 ; A. I. R. 1935 All. 852).

**44. Power to High Court to make rules.**—The High Court may make rules consistent with this Act as to—

(a) the filing of awards and all proceedings consequent thereon or incidental thereto ;

(b) the filing and hearing of special cases and all proceedings consequent thereon or incidental thereto ;

(c) the staying of any suit or proceedings in contravention of an arbitration agreement ;

(d) the forms to be used for the purposes of this Act ;

(e) generally, all proceedings in Court under this Act.

**45. Government to be bound.**—The provisions of this Act shall be binding on the Government.

**Comment**

Section 45 gives a statutory recognition to Government's civil liability to be bound by the arbitration agreement and award to the same extent as an ordinary individual.

**46. Application of act to statutory arbitrations.**—The provisions of this Act, except sub-section (1) of section 6 and sections 7, 12, 36 and 37, shall apply to every arbitration under any other enactment for the time being in force, as if the arbitration where pursuant to an arbitration agreement and as if that other enactment were an arbitration agreement, except in so far as this Act is inconsistent with that other enactment or with any rules made thereunder.

**Comment**

Section 46 applies with certain exceptions to the provisions of the Indian Arbitration Act to statutory arbitrations.

The words "for the time being in force" refer to law actually in force when the Arbitration Act was passed. (*East India Film* v. *P. K. Mukerjee*, A. I. R. 1954 Cal. 41).

**Statutory arbitration.**—Statutory arbitrations are not arbitrations by virtue of arbitration agreement between the parties but by virtue of some provisions in the statutes. The following are the names of some of the Acts where provision for arbitration has been made :

1. The Land Acquision Act, 1894. (Sections 11, 12, 18, 26) ;
2. The Religious Endowment Act, 1863 (Sections 16 and 17);

3. The Indian Trusts Act, 1882 (Section 43);

4. The Presidency Towns Insolvency Act, 1907 (Section 68 (h));

5. The Indian Electricity Act, 1910 (Section 52);

6. The Provincial Insolvency Act, 1920 (Section 52);

7. The Trade Disputes Act, 1929 (Sections 3 to 14);

8. The Indian Railways Act, 1890 (Sections 46, 46A, 46B and 48), etc.

**47. Act to apply to all arbitrations.**—Subject to the provisions of section 46, and save in so far as is otherwise provided by any law for the time being in force, the provisions of this Act shall apply to all arbitrations and to all proceedings thereunder :

Provided that an arbitration award otherwise obtained may, with the consent of all the parties interested, be taken into consideration as a compromise or adjustment of a suit by any Court before which the suit is pending.

## Comment

Section 47 applies, subject to section 46, to all arbitrations and renders an award obtained otherwise unenforceable. The Arbitration Act of 1940 does not apply to arbitration made before that Act came into force. It only applies to an award made under it. (*Manji* v. *Mehta*, A. I. R. 1943 Bom. 463).

**Scope of proviso.**—*Prima facie* section 47 governs reference to arbitration by parties in a pending suit without reference to or knowledge of the Court. The Act does not provide for arbitration in pending suits except through Court. According to the proviso to section 47, an award on the footing of an arbitration in a pending suit may only form the basis of a decree by consent. (*Ramaya* v. *Venkatachellam*, A. I. R. 1953 Mad. 834 : (1953) 1 M.L.J. 572). The proviso does not render the award valid nor does it make it enforceable as an award *proprio vigore*. The proviso enables the recognition of the award for a limited purpose by consent. Where such consent is withheld, it cannot be recognised even for limited purpose. (*Jugal Das* v. *Parshottam*, A. I. R. 1953 Cal. 690). In the

case of private partition in a pending suit where the arbitrators differ from each other and no consent of parties is available, the only course left for a Court is to ignore the arbitration and to decide the case on its merits. (A. I. R. 1953 Mad. 834).

Under the proviso to section 47, it is not open to the Court to record any arbitration award under Order 23, rule 3, Civil Procedure Code as an adjustment or compromise of a pending suit if objection is made to so recording it by any party to the suit. (*Raghunandan* v. *Sukhlal*, A. I. R. 1952 Pat. 253 ; 30 Pat. 985).

So there is no legal bar to the dispute which is the subject-matter of the pending suit being referred to arbitration without intervention of the Court. The award made in pursuance of such an arbitration may, with the consent of the parties interested, be taken into consideration as a compromise or adjustment of a suit under section 47 by any Court before which the suit is pending. (*Lakshmi Narain* v. *Ram Babu*, A. I. R. 1953 All. 9).

It is not clear from the proviso when the *consent* is to be obtained. There are two views expressed on this point by different High Courts.

One view is that the proviso does not rule out the award to which the consent was given before it comes up for decision in the Court. The Court will record the compromise straight a way if there is a consent of all the parties at the time of its consideration. If a party, however, disputes his consent, the Court is required to make an enquiry about it with its undisputed jurisdiction for the purposes of satisfying itself whether the suit has been adjusted by any lawful agreement or compromise. The Court, while recording a compromise, is not enforcing the award. It is only treating that award as a compromise or adjustment of the suit within the meaning of Order 23, rule 3, C. P. C. (*Abdul Rahaman Sahib* v. *Muhammad Siddiq*, A. I. R. 1953 Mad. 781 (F. B.) : I. L. R. (1953) Mad. 677 ; *Rameshwar Lal* v. *Mangilal*, A. I. R. 1964 Pat. 374 ; *Salima Bibi* v. *Md. Ibrahim Saheb*, A. I. R. 1962 A. P. 123 : (1961) 2 Andh. W. R. 96 ; *Nazir Mohammed* v. *Kastur Chand Gomaji & Co.*, A. I. R. 1951 Mys. 57 ; *D. Shamanna* v. *D. Gangappa*, A. I. R. 1971 Mys. 112 : (1970) 2 Mys. L. J. 478).

The other contrary view is that such an award cannot be taken into consideration even under Order 23, rule 3 unless a joint consent of all the parties interested is forthcoming before the Court in which the suit is pending. (*Jugal Das Damodar Modi & Co.* v. *Pursottam Umedbhai & Co.*, A. I. R. 1953 Cal. 690 : 92 Cal. L. J. 181 ; *Zeauddin* v. *Abdul Rafique*, A. I. R. 1952 Pat. 66; *Phool Narain* v. *Madan Gopal*, A. I. R. 1955 Raj. 162 : I. L. R. (1955) 5 Raj. 580).

An award obtained without the intervention of Court in respect of matters which are the subject-matter of a proceeding pending in a Court of law can only be given effect to as an adjustment under Order 21, rule 2 or under Order 23, rule 3 of the Code of Civil Procedure if all the parties interested give their consent to this being done and not otherwise. (*Lala Moradhwaj* v. *Lala Bhudar Das*, 1955 A. L. J. 96 (F. B.)).

P filed a suit for dissolution of partnership and for rendition of accounts against D. During the pendency of the suit the parties entered into an agreement by virtue of which they appointed an arbitrator who was authorised to give an award in respect of the disputes that had arisen between the parties. The matter was accordingly referred to the arbitrator who pronounced the award. The plaintiff thereafter applied to the Court praying that a decree be passed in terms of the award given by the arbitrator. This was objected to by the defendant.

The proviso appended to the above section requires that before the Court can take into consideration an award given by an arbitrator, all the parties interested in it must consent to the award being given effect to. As a result of the above provision of law, where a dispute with respect to a matter is pending in a Court of law and the parties refer the said matter to an arbitrator who gives an award in respect thereof without the intervention of the Court, it is not open to the Court to accord recognition to the said award unless all the parties interested therein give their consent to it. Therefore the application is liable to be dismissed.

As between parties to a compromise or an award or persons claiming under rival parties, the title of each party prior to the award or compromise cannot be set up so as to defeat a title acquired under the compromise or award. If a person binds himself by any valid contract supported by consideration, he cannot resile from his contract. This is also true of an adjustment of rival claims to property whether the adjustment is by way of compromise or through the intervention of arbitrator. This does not, however, mean that when this notice of the title of a person whose possession is being enquired into as between person claiming under him, title prior to compromise must be ignored as non-existent, and if the award is treated on the same footing as a decree of a Court, the position is not different since it is well recognised that a decree does not create but only recognises a pre-existing title and gives reliefs on its basis. (*Kuar Man Singh* v. *Lal Dharam Murat*, A. I. R. 1955 All. 261).

**Second appeal**:—No second appeal lies from an order recording an award as compromise, but the appeal can be treated as

revision. (*Nihal Singh* v. *Ashtawaker*, A. I. R. 1930 Lah. 860 ; 127 I. C. 705 ; but see *Ganga Prasad* v. *Thakur*, A. I. R. 1938 All. 46 ; 1937 A. L. J. 1133).

**48. Saving for pending references.**—The provisions of this Act shall not apply to any reference pending at the commencement of this Act to which the law in force immediately before the commencement of this Act shall, notwithstanding any special repeal effected by this Act, continue to apply.

**Comment**

**Scope of the sectien.**—The Arbitration Act, 1940 came into force on lst July, 1940 and the references made before this date are not within the provisions of this Act. (*Appollo Mills* v. *Babu Bhai*, A. I. R. 1944 Bom. 12).

Section 48 saves references pending at the commencement of this enactment and such references continue to be governed by the law existing prior to this Act.

Where the agreement of reference to arbitration was entered into on 18th April, 1940, i.e., nearly $2\frac{1}{2}$ months before the Arbitration Act, 1940 came into force on lst July, 1940 but the arbitrators did not take any action till lst December, 1940 when they commenced the regular sitting, it was *held* that, in the absence of evidence as to the date of their acceptance of the appointment, it must be held that the reference to arbitration was pending at the commencement of the Act within the meaning of this section so as not to attract the application of the Act. (*Chouth Mall* v. *Ram Chandra*, I. L. R. (1955) Nag. 126).

**49. Repeals and Amendments.**—(1) The enactments specified in the Third Schedule are hereby repealed to the extent mentioned in the fourth column thereof.

(2) The enactment specified in the Fourth Schedule are hereby amended to the extent and in the manner mentioned in the fourth column thereof.

## THE FIRST SCHEDULE

*(See Section 3)*

**Implied Conditions of Arbitration Agreements.**

1. Unless otherwise expressly provided, the reference shall be to a sole arbitrator.

2. If the reference is to an even number of arbitrators, the arbitrators shall appoint an umpire not later than one month from the latest date of their respective appointments.

**Comment**

**Scope of the paragraph.**—The Arbitration Act does not say that when the reference is to an even number of arbitrators, the failure to appoint an umpire vitiates the award. The intention of this paragraph is that the umpire whose function it is to decide on a difference between the arbitrators should normally be appointed before any difference arises between them. Whatever may be the result in a case of disagreement between the arbitrators, where no disagreement arises between the arbitrators and there is no need for an umpire, to regard the omission to appoint him as fatal to the validity of all the proceedings would only result in general inconvenience without promoting any object considered essential by the statute. The statute in such a case can be complied with by the arbitrators appointing an umpire just before delivering their award. But such a compliance is purposeless. When the objector cannot point to any prejudice because of the omission to appoint an umpire, the omission does not vitiate the award. (*Tikaram* v. *Hans Raj*, A. I. R. 1954 Nag. 241). But in the Allahabad case *Jwala Prasad* v. *Amar Nath*, A. I. R. 1951 All. 474, the Court observed :

"It is clear that the arbitrators, where there is a reference to an even number of arbitrators, are under a statutory obligation to appoint an umpire not later than one month from the latest date of their respective appointments. It strikes us that the arbitrators have no option in the matter of the appointment of an umpire. The provisions of this paragraph are of a mandatory character and it is clearly the duty of the arbitrators to appoint an umpire. This, of course, is on the footing that there is no express provision to the contrary in the agreement. We may also refer to paragraph 1 of Schedule I. The point is that it is open to the parties by their agreement to waive this condition about the appointment of an

umpire. This being our view, it is clear that, in the circumstances of this particular case, the award made is not valid."

According to section 3 of the Arbitration Act, an abitration agreement shall be deemed to include the provisions set out in the First Schedule in so far as they are applicable to the reference unless a different intention is expressed in the agreement. Where there is a clear provision in the agreement of reference to arbitration that the arbitrators will be entitled to appoint an umpire only if they happen to disagree, it means that the power to appoint an umpire is contingent on their disagreement and cannot be exercised before they have agreed to disagree. This provision in the agreement must be held to contain an intention different from what has been expressed in paragraph 2 of the First Schedule, and hence its provisions cannot be attracted to the particular reference. (*Sukhlal* v. *Manchand*, 219 I. C. 162 ; A. I. R. 1945 Lah. 34). In fact the rules laid down in the First Schedule come into application only where a different intention does not exist. When the arbitration agreement clearly shows that the intention of the party is that two of the arbitrators out of the three will be perfectly within their rights to make award, it cannot be said that they have no jurisdiction to make the award for failure to appoint an umpire. (*Ismail* v. *Hans Raj*, A. I. R, 1955 Raj. 153).

**Umpire.**—The ordinary meaning of the word "umpire" is a person who is to decide upon disagreement. (*Louis Dreyfus* v. *Heman Das*, A. I. R. 1940 Sind 37).

There is a technical meaning which is often applied to this word. It is used to denote a person (often appointed by the arbitrators themselves) who is to settle any differences that may arise between the arbitrators. (*Gulab Singh* v. *Dhuni Chand*, 46 P. R. 1889).

A committee of an association may constitute an umpire. (*Hira Lal* v. *Joakim*, A. I. R. 1927 Cal. 647 ; 103 I. C. 648 ; 55 Cal. 180). The word "umpire" cannot mean "umpire or any higher domestic tribunal upon which the parties may agree" (*ibid*, A. I. R. 1927 Cal. 647).

The word "umpire" is a term of art and has a special meaning in the law relating to arbitration. (*Chauth Mal* v. *Ram Chandra*, I. L. R. 1955 Nag. 100 ; A. I. R. 1955 Nag. 126).

**Mode of Appointment of Umpire.**—The appointment of an umpire by the arbitrators is a judicial act. They must, therefore, meet and exercise the power together. [ (1867) L. R. 2 Q. B. 367 at P. 376]. They owe a duty to the parties to select a fit and proper per-

son as umpire and must not, therefore leave the selection to chance, but as between several persons whom they both consider fit and proper person to discharge the duty of umpire,they may select by lot whom they will appoint. (*Halsbury*, Vol. I, page 457. *See* also *Young* v. *Miller*, 3 B & C 407 and *Harris* v. *Mitchell*, 2 Vern. 485). But where the arbitrators, after tossing up for the choice, abandoned the choice made and, afterwards one of them, by consent of the other, appointed the umpire, it was held that the appointment was good. (*In re* Vennikum, 10 L. J. Q. B. 128). But an umpire may be appointed by lot if the parties to the reference assent to such a mode of election. (*Taylor* v. *Backhouse*, 2 L. M. & P. 70).

An appointment of an umpire by lot consented by the attorney's clerk but not by the attorneys themselves or their client is bad, although the parties in ignorance of the mode of appointment have attended the arbitratior. (*In re* Hodson, 7 D. P. C. 569).

The signing of the appointment of an umpire is not a judicial act and, theretore, need not be done by the arbitrators at the same time or together. (*In re* Hopper, 8 B. & S. 100).

"Appoint" means concur in appointing. The Court has no jurisdiction to appoint some body as umpire if the arbitrators differ, where the deed of reference to arbitration filed by the parties makes no provision for this contingency but expressly states that the Court should then decide the matter. (*Ramzani* v. *Nur Ahmadi*, 189 I. C. 466 ; A. I. R. 1940 Lah. 276).

In case of appointment of an umpire, approval of the parties is not necessary. (*Oliver* v. *Collings*, 11 East, 367). But appointment of an umpire is not effectual unless he accepts the office. (*Ringland* v. *Lowndes*, (1863) 15 C. B. N. S. 173).

**Powers and Duties of Umpire.**—The powers and duties of an umpire when he is called upon to act, are in general the same as that of the arbitrator.

The umpire must hear evidence of the parties and their witneses if the application is made to him to do so by either party, notwithstanding that the same evidence has already been adduced before the arbitrators. The umpire is not justified, in face of an objection by either party, in taking part of the evidence from the notes of the arbitrators, unless there are special provisions in the submission permitting him to do so. (*Russell*).

The umpire must be strictly impartial and, like an arbitrator, must not hear one party in the absence of the other. (*Russell*).

Any undisclosed personal interest will disqualify an umpire and, even where the umpire himself is not open to any suggestion of impropriety, the discovery of impropriety on the part of one of the arbitrators may be enough to cause the Court to set aside the award of the umpire if there is any reason to fear that the decision of the umpire may have been influenced by the arbitrator who was proved to have acted improperly. (*Russell*).

In order to save the delay and expense of two investigations of evidence, it is often arranged that the umpire shall sit with the arbitrators and hear the evidence once for all. If without any special arrangement the umpire sits with the arbitrators and hears the evidence, that is no ground of objection to the award but the umpire ought not, in such a case, to interfere with the arbitrators when they discuss the case. (*Russell*).

3 The arbitrators shall make their award within four months after entering on the reference or after having been called upon to act by notice in writing from any party to the arbitration agreement or within such extended time as the Court may allow.

**Comment**

The law as to time for the making of an award incorporated in the Indian Arbitration Act is almost the same as was contained in section 15 of the British Statute of 1854.

If there is an express term for the making of the award in the arbitration agreement under the Act, that term prevails.

In the absence of such a term, clause 3 of the First Schedule becomes a term of the agreement in accordance with section 3 of the Act. (*M/s. Bokaro & Ramgur Ltd.* v. *Dr. Prasun Kumar Banerjee*, A. I. R. 1968 Pat. 150 (F. B.) at p. 156 : I. L. R. 46 Pat. 1259 : 1968 B. L. J. R. 240).

It was held in the case of *M/s. Bokaro & Ramgur Ltd.* v. *Dr. Prasun Kumar Banerjee*, A. I. R. 1968 Pat. 150 (F. B.) that—

(a) The petitioner company was entitled to put a stop to the arbitration proceeding on the expiry of 4 months after the arbitrator entered on the reference because of the stipulation in the arbitration agreement imported under the Act, but it waived it and allowed the proceeding to proceed as though the stipulation did not exist. Thus, it waived its right.

(b) For application of the principle of estoppel, waiver or acquiescence, two points of distinction must be noticed :—

(i) First, taking part in the proceeding before the arbitrator after the expiry of 4 months is not acquiescing in any illegal act or transaction.

(ii) Secondly, it has not the effect of extending the time by consent of parties as such a consent in the form of a valid agreement can be given only in writing and not by conduct.

(c) If the Company takes a willing part in the deliberations before the arbitrator after the expiry of 4 months without any objection, protest or the like, it is estopped from challenging the validity of the award on the ground of its having been made after the expiry of the period.

The material facts in the case of *Hari Shanker Lal v. Shambhu Nath*, A. I. R. 1962 S. C. 78 : (1962) 2 S. C. R. 720, were that, on August 17, 1948, the appellant and respondents 1 and 2 and their mother, by a registered deed of agreement, referred their dispute regarding the partition of two houses, to two arbitrators. Within 10 days of the reference, the arbitrators gave notice to the parties and began to take evidence, that is, they entered on the reference. On July 25, 1949, the mother died and the arbitrators did not proceed with the enquiry. On August 31, 1950, that is, more than one year after the death of the mother, the appellant gave a notice to the arbitrators requesting them to proceed with the reference and give an award at an early date. On October 1, 1950, that is, 4 months from the date of the notice, the arbitrators made an award.

It is not clear from the facts whether, within the period August 31 and October 1, 1950, the respondents had taken part in the proceedings before the arbitrators.

When the appellant wanted the first court to make the award a rule of the Court, the respondents objected to it on several grounds one of which was that the award was not given within the time fixed by law.

The question before the Supreme Court was whether the award had been made on the expiry of the period of 4 months within the meaning of clause 3 of the First Schedule. The Supreme Court *held* that—

1. A *notice* to act may be given *before or after* the arbitrators entered upon the reference.

2. If notice to act is given *before* they entered upon the reference, the 4 months would be computed from the date they entered upon the reference.

3. If a party gives notice to act within 4 months *after* the arbitrators entered upon the reference, the arbitrators can make an award within 4 months from the date of such notice.

4. In that event, after the expiry of the said 4 months, the arbitrators become *functus officio*. unless the period is extended by court under section 28. Such period may also be extended by the Court, though the award has been factually made.

The point which fell for decision before the Supreme Court and was decided was that a notice to act given after the expiry of 4 months from the date the arbitrators entered on the reference, cannot give a fresh starting point for computation of the period of 4 months under clause 3 of the First Schedule.

4. If the arbitrators have allowed their time to expire without making an award or have delivered to any party to the arbitration agreement or to the umpire a notice in writing stating that they cannot agree, the umpire shall forthwith enter on the reference in lieu of the arbitrators.

5. The umpire shall make his award within two months of the entering on the reference or within such extended time as the Court may allow.

6. The parties to the reference and all persons claiming under them, shall, subject to the provisions of any law for the time being in force, submit to be examined by the arbitrators or umpire on oath or affirmation in relation to the matters in difference and shall, subject as aforesaid, produce before the arbitrators or umpire all books, deeds, papers, accounts, writings and documents within their possession or power respectively, which may be required or called for, and do all

other things which, during the proceedings on the reference, the arbitrators or umpire may require.

7. The award shall be final and binding on the parties and persons claiming under them respectively.

8. The costs of the reference and award shall be in the discretion of the arbitrators or umpire who may direct to, and by whom, and in what manner such costs or any part thereof shall be paid, and may tax or settle the amount of costs to be so paid, as between legal practitioner and client.

## THE SECOND SCHEDULE

(*See* Section 41)

### Powers of Court

1. The preservation, interim costody or sale of any goods which are subject-matter of the reference.

2. Securing the amount in difference in the reference.

3. The detention, preservation or inspection of any property or thing which is the subject of the reference or as to which any question may arise therein and authorizing for any of the aforesaid purposes any person to enter upon or into land or building in the possession of any party or the reference, or authorizing any samples to be taken, or any observation to be made, or experiment to be tried, which may be necessary or expedient to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence.

4. Interim injunctions or the appointment of a receiver.

5. The appointment of a guardian for a minor or person of unsound mind for the purposes of arbitration proceedings.

## THE THIRD SCHEDULE

### Enactments Repealed

**Repealed by S. 2 and Sch. I of the Repealing and Amending Act, 1945 (6 of 1945).**

## THE FOURTH SCHEDULE

### Enactments Amended

**Repealed by S. 2, Sch. I of the Repealing and Amending Act, 1945 (6 of 1945).**

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